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Constitutional Torts Ten Years after Bivens

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STUDENT PROJECT

CONSTITUTIONAL TORTS TEN YEARS AFTER BIVENS

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Sir William Pitt, quoted in 1 T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 611 (8th ed. 1927)

If there be a country in the world where the doctrine of the sovereignty of the people can be fairly appreciated . . . that country is assuredly America.

1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55 (rev. ed. 1899)

A few plain and practical rules will do for a wandering horde of savages, but they must and will be much more extensively ramified when civilization has polished, and commerce and arts and agriculture enriched, a nation.

Judge Turley, Jacob v. State, 22 Tenn. (3 Hum.) Rep. 493, 515 (1842)

For people in Bivens’ shoes, it is damages or nothing.


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I. INTRODUCTION

The American experience has been uniquely institutional. For more than two-hundred years, great social change has found acceptance, even if at times overdue, in one of the fora of government. If "[t]he idea of perfectibility is . . . as old as the world,"¹ the framers of the Constitution were prescient in providing a system capable not only of withstanding change but also of integrating the ideals of new and different eras. Thus our idiosyncratic mix of freedom and equality, constantly changing, gaining content, and seeking coexistence, has been well served in the most pluralistic of societies. Our institutions have avoided the indelible "stamp of the age in which they were first hammered out."²

The judiciary has played an increasingly important role in this evolution. Because "the Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context,"³ the impact of the judicial role has been particularly strong in the last several de-

¹. 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 34 (rev. ed. 1899).
cades. While one is tempted to trace the start of this era to the Brown decision\(^4\) in 1954, it is more properly viewed as beginning just after the executive and legislative branches of the federal government started to assert themselves during the Roosevelt years. The massive increase in the scope and reach of the national government demanded, in its wake, an active (if not an activist) federal judiciary.\(^5\) Thus the increased power of the executive was questioned;\(^6\) the power of Congress condemned but quickly given new life;\(^7\) the right of all people to share in the success of new-found prosperity\(^8\) affirmed and reaffirmed.\(^9\)

The tripartite institutional structure proved as malleable as the laws it produced. A fourth branch of government, exhibiting characteristics of each of its progenitors, emerged in the form of an administrative bureaucracy.\(^10\) One hundred years before the New Deal, Tocqueville wrote: "Public officers in the United States are commingled with the crowd of citizens; they have neither palaces, nor guards, nor ceremonial costumes."\(^11\) A century later, "a host of zealous lawyers and academics descended upon the nation's capital with a strong belief in the inevitability and viability of centralized economic planning."\(^12\) The arrival of the bureaucrats presented an age-old dichotomy: As the new servants of government sought an egalitarian economics, they threatened the privacy and welfare of their intended beneficiaries.\(^13\) Just as Icarus had ignored the warnings of Daedalus and soared too high with the Daedalian wings, the administrative state seemed to have forgotten the warnings of the Constitution’s framers:

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8. See L. Friedman, supra note 5, at 575-76.
10. Stewart, supra note 5, at 1671-88.
11. 1 A. de Tocqueville, supra note 1, at 209.
[T]here is in the nature of sovereign power an impatience of control, that disposes those who are invested with the exercise of it, to look with an evil eye upon all external attempts to restrain or direct its operations. From this spirit it happens that in every political association there will be found a kind of eccentric tendency in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common center.14

When Webster Bivens filed his complaint pro se in federal district court in 1967,15 he was no doubt primarily concerned that he be afforded relief for injury suffered at the hands of federal agents. Bivens' case, however, represented much more than a variation on the theme of common law torts. Decades of centralization had left some with the view that the sanctity of the federal functionary—or of the federal government—was somehow as worthy of protection as the constitutional rights of the individual citizen.16 "The will of the nation," however, "is one of those expressions which have been most profusely abused by the wily and the despotic of every age. . . . [S]ome have even discovered it in the silence of a people, on the supposition that the fact of submission established the right of command."17 Webster Bivens' pro se action thus served to remind us that "[e]lected magistrates do not make the American democracy flourish; it flourishes because the magistrates are elective."18

It is now ten years since the Supreme Court held that Webster Bivens was entitled to damages for the violation of his fourth amendment rights.19 The decision stands as a microcosm of American constitutional law. Questions of federalism, separation of pow-

14. The Federalist No. 15, at 96-97 (A. Hamilton) (J. Cooke ed. 1961); see 5 The Writings of James Madison 269 (C. Hunt ed. 1904): "[T]he invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."
17. 1 A. De Tocqueville, supra note 1, at 55.
18. 2 id. at 112.
ers, and constitutional interpretation were all raised in the argument of the case. As with most groundbreaking decisions,\textsuperscript{20} \textit{Bivens} raised more questions than it answered; the past ten years have seen an attempt by the federal courts to deal with those questions.

This Project will attempt to define the legitimate contours of a federal cause of action for the monetary redress of constitutional violations by establishing a normative theory for the judiciary's role. Section II will provide historical justifications based largely on the relationship between the judiciary and other branches of government on one hand and between the individual and government on the other. Section III will trace the development of the cause of action in light of the perspectives offered in the previous section. The fourth, fifth, and sixth sections will examine possible limitations on the action: Section IV will deal with procedural obstacles to the institution of the cause of action; section V will consider the defenses and immunities available to those properly brought into court; section VI will propose an organic theory of damages intended to satisfy the plaintiff's compensatory needs, the citizenry's concern with deterrence, and the system's goal of constitutional perpetuation. In conclusion, the Project will suggest that the vitality of the \textit{Bivens} cause of action is consistent with, supportive of, and compelled by "[t]he very essence of civil liberty."\textsuperscript{21}

\section*{II. Historical Perspectives}

\textbf{A. Federalism and the Creation of the Supreme Court}

The development of a federally enforced remedy for the vindication of federal constitutional rights would seem at first blush not to implicate questions concerning the proper allocation of powers between the several state governments and the federal government.\textsuperscript{1} In considering the history of constitutional jurisprudence, however, it becomes clear that the relatively late recognition of an implied damage remedy parallels, at least in part, changing notions of federalism. In the beginning, the framers of the Constitution

\begin{footnotesize}
\begin{enumerate}
\item \textit{But see} L. \textsc{Tribe}, \textit{American Constitutional Law} § 2-3, at 17 (1978) (arguing that issues which apparently touch on only separation-of-powers concerns often also implicate federalism concerns).


\item Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
\end{enumerate}
\end{footnotesize}
were acutely aware of the colonial experience with the King of England and sought to avoid the creation of a domineering central authority for the new nation. The Constitution came to be viewed by many as “the only guarantee against centralization.” Thus any assertion that the federal courts were the proper forum for the redress of rights allegedly violated by a federal official could logically have been viewed as ironic.

The framers attempted to deal with the enforcement concern by providing for the concurrent exercise of executive, judicial, and legislative powers by the federal government and the state governments. This design was intended to foster state control of purely state matters and national control of federal matters. Providing definition to this distribution, however, has proven to be an exceedingly difficult task. James Madison, in addressing opposition to constitutional ratification, emphasized that those powers granted the federal government were to be exercised primarily in external affairs, while state power would extend to all those objects which in the course of ordinary affairs concern the lives, liberties, and properties of the people. At the same time, it has been recognized that the “Madisonian clockwork would enable the forces and counterforces of government to mesh as needed . . . to shield the individual and community from governmental oppression and discrimination.” Thus, even if the power to protect individual rights was

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6. THE FEDERALIST No. 45 (J. Madison).

7. L. Tribe, supra note 1, § 2-1, at 15 (emphasis added). Indeed, one authority
seen at the time of the revolution\(^8\) to properly rest in state government, it could have been equally well argued that the pendulum of authority was to swing as suggested by the course of a history yet to unfold.\(^9\)

The endorsement of a cause of action in federal court for the redress of a constitutional violation can be seen as an outgrowth of the development of the federal judicial system. The founders' agreement that a national judiciary should be established\(^10\) masked their differences as to the form and jurisdiction of that tribunal. The provision in the plans of the convention for a Supreme Court met little resistance,\(^11\) a fact left without illumination in the records of the Convention. The proposal for inferior federal courts, however, met strong opposition, apparently founded on a fear that their establishment would lead to federal judicial usurpation of state court power.\(^12\)

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8. Professor Crosskey was one of a very few scholars to suggest that the framers intended the federal judiciary to have jurisdiction over questions of substantive law. See 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 711-19 (1953). His thesis met particularly strong criticism, which was evaluated in Gilmore, The Age of Antiquarius on Legal History in a Time of Troubles, 39 U. CHI. L. REV. 475, 485-87 (1972).

9. "'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE." THE FEDERALIST No. 82, at 553 (A. Hamilton) (J. Cooke ed. 1961).

10. "That there should be a national judiciary was readily accepted by all." M. FARRAND, THE FRAMING OF THE CONSTITUTION 79 (1913).

11. All plans considered included establishment of a Supreme Court. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21-22, 244, 292 (rev. ed. M. Farrand ed. 1937); 2 id. at 432; 3 id. at 600. Professors Hart and Wechsler discuss the agreement to a federal judiciary by the participants of the Constitutional Convention as being arrived at without discussion. The idea of a federal tribunal had some precedent in colonial times but the proposal at the Convention was an innovation in that it established a national tribunal with judicial power to be joined with executive and legislative branches as part of a national government. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 4-6 (2d ed. 1973); see THE FEDERALIST No. 22 (A. Hamilton).

12. "The most serious question was that of the inferior courts. The difficulty lay in the fact that they were regarded as an encroachment upon the rights of the individual states. It was claimed that the state courts were perfectly competent for the work required, and that it would be quite sufficient to grant an appeal from them to the national supreme court." M. FARRAND, supra note 10, at 79-80; accord, THE FEDERALIST No. 82 (A. Hamilton).
The Convention eventually agreed to leave that issue to the dictates of Congress.\footnote{3. "The decision that was reached was characteristic of much of the later work; at this early stage of the proceedings, it might be regarded as prophetic of the ultimate outcome of the convention's labors. In other words, the matter was compromised: inferior courts were not required, but the national legislature was permitted to establish them." M. Farrand, supra note 10, at 80 (emphasis in original). The plans submitted to the Convention ranged from mandatory establishment of inferior federal tribunals to the states'-rights position of allowing state tribunals the power of decision in the first instance. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, supra note 11, at 11.} While the vote accepting the "no plan" compromise was unanimous,\footnote{4. 2 The Records of the Federal Convention of 1787, supra note 11, at 45-46.} it cannot obscure the fact that the framers clearly foresaw a preeminent role for Supreme Court review of state court decisions (and by implication all decisions) affecting constitutional interests. In predicting their relationship, Alexander Hamilton argued that the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.\footnote{15. The Federalist No. 82, at 556 (A. Hamilton) (J. Cooke ed. 1961).}

While Hamilton's view was largely descriptive, Thomas Jefferson offered a normative justification for judicial enforcement of the Bill of Rights, conceiving of the federal judiciary as "a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity."\footnote{16. Letter from Thomas Jefferson to James Madison (March 15, 1789), reprinted in 14 The Papers of Thomas Jefferson 659, 659 (J. Boyd ed. 1958). Jefferson's observations concerning the quality of the federal judiciary merit particular attention since state court judges frequently had little or no legal training. D. Boorstin, The Americans: The Colonial Experience 199-200 (1958); G. Gilmore, supra note 2, at 21-22; W. Nelson, Americanization of the Common Law 32-33 (1975); Fisher, The Administration of Equity Through Common Law, 1 Law Q. Rev. 455, 456 (1885).}

Thus, although in the interests of federalism the framers avoided the institution of lower federal courts, they nonetheless struck a balance between state and federal authority by providing for Supreme Court review of constitutional questions.\footnote{17. See U.S. Const. art. III, § 2, cl. 1: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . ."} That power, however, was never explicitly defined in terms of interpret-
tive, injunctive, or remedial authority.\(^1\) Moreover, with only one
federal court extant, the opportunities for the national judiciary to
inform the construction and application of constitutional law were
necessarily limited.

**B. The Role of Inferior Courts in a Federal System**

Given the limits imposed on the Supreme Court, the early de-
velopment of constitutional interpretation, at least as to individual
rights, was left largely to the state courts.\(^1\)\(^9\) The Judiciary Act of
1789,\(^2\)\(^0\) which was the twentieth enactment of the First Congress,
established inferior federal courts. The original jurisdictional grant
to these courts, however, did not include power to hear cases
arising under the Constitution. Until 1875, when Congress re-
moved this barrier,\(^2\)\(^1\) remedies for constitutional violations rested
within the authority of state tribunals, though subject to review by
the Supreme Court. The state courts developed a political admix-
ture of American and British precedent.\(^2\)\(^2\) While it was not consid-
ered binding on American courts, "the common law was from the
first looked upon by the colonists as a system of positive and sub-
sidiary law, applying where not replaced by colonial enactments or
by special custom suited to new conditions."\(^2\)\(^3\) The common law
analogue applied with equal force to constitutional as well as statu-
tory interpretation. As the Supreme Court recognized in 1887,
"[t]he interpretation of the Constitution of the United States is
necessarily influenced by the fact that its provisions are framed in
the language of the English common law, and are to be read in the
light of its history."\(^2\)\(^4\)

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18. *See* text accompanying notes 100-118 infra.
20. Ch. 20, §§ 2-5, 1 Stat. 73 (italic in original) (current version at 28 U.S.C. §§
41, 43, 81-132 (1976 & Supp. III 1979)):
§ 2. *And be it further enacted*, That the United States shall be, and they
hereby are divided into thirteen districts . . . .
§ 3. *And be it further enacted*, That there be a court called a District
Court in each of the afore mentioned districts . . . .
§ 4. *And be it further enacted*, That the before mentioned districts . . . .
shall be divided into three circuits . . . . and that there shall be held annually
in each district of said circuits, two courts, which shall be called Circuit
Courts . . . .
§ 1331(a) (1976), as amended by Federal Question Jurisdictional Amendments Act of
23. P. REINSON, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 6
Two English cases in particular provided state courts with authority for the implication of a damage remedy from the fourth amendment. *Wilkes v. Wood*, 25 decided in 1763, presented a question which Chief Justice Pratt found to be "of the greatest consequence he had ever met with in his whole practice." 26 John Wilkes, a member of Parliament, had published anonymously a series of papers called the *North Briton*. 27 The forty-fifth of that series, like many of the others, was highly critical of the King and the government. In response, the secretary of state, Lord Halifax, issued a warrant ordering the King's messengers "'to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers.' "28 Upon arrival at Wilkes' home, the messengers broke into his files and removed all of his papers without regard to content. 29

Chief Justice Pratt instructed the jury that absent "proof positive" 30 as to the people and papers to be searched, "a discretionary power given to messengers to search wherever their suspicions may chance to fall," 31 should be found illegal as "contrary to the fundamental principles of the constitution." 32 The jury returned a verdict for the plaintiff of one-thousand pounds against the state official who had supervised the procedures. 33

The *Wilkes* case is significant for several reasons. First, it established authority for the substance of the fourth amendment later to come. Indeed, John Wilkes carried on correspondence with noted American revolutionaries including John and Samuel Adams and John Hancock. 34 In England, the decision led to a long and successful career for Pratt, later to become Lord Camden, 35 and spawned similar actions. Wilkes, in fact, later brought suit against Lord Halifax, the secretary of state who issued the warrant, and re-

26. Id. at 498.
28. Id. (ellipsis in original) (quoting unidentified warrant).
30. Id. at 498.
31. Id.
32. Id. at 499.
33. Id.
34. N. LASSON, supra note 27, at 46 n.114.
35. Id. at 47.
covered a judgment of four-thousand pounds. Most important, the Wilkes case specifically established precedent for the grant of both compensatory and exemplary damages to serve the purposes of compensation and deterrence. As Chief Justice Pratt found, "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."\[37\]

The general warrant issued by Lord Halifax led to the arrest of forty-nine people\[38\] and to several suits beside the Wilkes case resulting in a verdict for plaintiffs.\[39\] Prior to that activity, a warrant specific as to the person but general as to papers was issued for the arrest of John Entick.\[40\] Upon hearing of Mr. Wilkes' success, Entick brought suit and recovered a judgment of three-hundred pounds.\[41\] Although Entick v. Carrington\[42\] was decided after Wilkes, it takes on a separate significance. In Parliament, the combined force of the Entick and Wilkes cases led to the adoption of legislation making the issuance of general warrants in cases of libel illegal.\[43\] Its greatest precedential value, however, lies in the United States Supreme Court's 1886 decision of Boyd v. United States.\[44\] In Boyd, the Court was faced with the question whether federal legislation requiring the party opposing the government to produce in court certain private papers without a specific warrant was violative of the fourth and fifth amendments.\[45\] Historical analysis weighed heavily in the Court's decision.

Justice Bradley, after reviewing the relevant statutes,\[46\] noted that the practice complained of had its roots in prerevolutionary history.\[47\] He summarized the Wilkes case, specifically noting the awards of damages recovered.\[48\] Justice Bradley then reviewed the

36. See id. at 45.
38. N. LASSON, supra note 27, at 43.
41. N. LASSON, supra note 27, at 47.
42. 95 Eng. Rep. 807 (K.B. 1765).
43. N. LASSON, supra note 27, at 49.
44. 116 U.S. 616 (1886).
45. Id. at 617-23.
46. Id.
47. Id. at 624-25.
48. Id. at 626.
Entick case, stressing that it “was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country.”

Of particular importance, he believed that since every American statesman [sic], during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment...

Finally, quoting from Lord Camden’s (formerly Chief Justice Pratt) opinion in the Entick appeal, Justice Bradley argued that “‘where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.’”

It has been long recognized that the roots of the fourth amendment lie in the eighteenth-century British determination that warrants authorizing a “roving commission” are repugnant to a free society. Given the concomitant British practice of awarding damages for this invasion, it makes little sense to argue that violations of the same right, now accorded written constitutional status, were intended to receive a lesser degree of remedial protection. While the redress of constitutional violations was within the original jurisdiction of state courts only, the framers did not intend that such courts would be without the authority, indeed the responsibility, to go beyond state law in deciding constitutional cases. Hamilton recognized that the supremacy of the document was applicable in state adjudication as well as federal. The rather circuitous practice of seeking relief in state court for the violation of a federally created right, particularly given the role intended by the framers for the national judiciary, is a direct outgrowth of the federal system. However, particularly in light of British common law precedent, it would be fallacious to then suppose that state law was intended to delimit the substantive incidents of a federal action. Thus, whether state court decisions actually contributed to the de-

49. Id.
50. Id. at 626-27.
51. Id. at 628 (emphasis added) (quoting unreported opinion).
52. N. Lasson, supra note 27, at 43.
54. See text accompanying notes 1-18 supra.
velopment of the Constitution as a "sword" is a question properly viewed as environmental rather than genetic.

C. The Interplay of the Constitution and the American Experience

The discovery of common law precedent for the implication of a damage remedy, even when coupled with the Supreme Court's recognition of that precedent, does not fully explain the validity of the implication. For once it is recognized that the common law was intended to be molded as necessary to meet the very different environmental and sociological realities of the American experience, it must then be asked whether the remedial power under reference was consistent with the morphogenesis of the American judicial function. Two lines of reasoning—one dealing with the institutionalization of the judiciary's interpretive function, the other with the content of the interpretation—support the conclusion that the damage remedy is consistent with what Professor White has called "an indigenous American jurisprudence."

The institutional argument begins with the recognition that American judicial review was derived from the British model. While the British version was largely an exceptional check, placed in the authority of the House of Lords, on objectionable judicial decisions, the American version was a necessary corollary to the principle of constitutional government. As the framers sought a government of limited powers, "[j]udicial review was the inarticulate major premise upon which the movement to draft constitutions and bills of rights was ultimately based."

The federal structure itself demanded the provision of a body capable of accommodating the decisions of thirteen state tribunals. The states, in recognition of their individual sovereignties, were accorded the power to pass on the interpretation of laws in the first

55. Dellinger, supra note 4 (title). Indeed, the government argued in Bivens that the lack of lower federal court original jurisdiction regarding constitutional questions, see text accompanying notes 10-14 supra, indicated that the framers contemplated only state common law providing a basis for actions seeking to enforce rights otherwise arising under the Constitution. Brief for Respondents at 10, Bivens, 403 U.S. 388 (1971).

56. See W. Nelson, supra note 16, at 30; White, supra note 4, at 1213-17.

57. White, supra note 4, at 1224.


59. The Federalist No. 81 (A. Hamilton).

60. B. Schwartz, supra note 19, at 33.
instance. However, recognizing the need for uniformity, the Supreme Court was provided with the power of appellate review in federal matters. The desire for a uniform system of law regarding national matters, moreover, was based on more than the need for a final arbiter. For hypothetically, at least, any particular state court could have been invested with the power of ultimate review. As Hamilton wrote,

the frame of the government is so compounded, that the laws of the whole are in danger of being contravened by the laws of the parts. In this case if the particular tribunals are invested with a right of ultimate jurisdiction, besides the contradictions to be expected from difference of opinion, there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations. As often as such an interference was to happen, there would be reason to apprehend, that the provisions of the particular laws might be preferred to those of the general laws.

Thus the power of judicial review was placed in a national tribunal.

Such a placement was also justified on grounds of expertise. The colonial practice of appointing nonlawyer judges continued after independence, even at high state court levels. In establishing a national judiciary, the framers were likely influenced by the "professionalization" of the British bench and bar. Both Hamilton and Jefferson cited the development of a highly quali-

61. U.S. Const. art III, § 2, cl. 2.
63. Some have argued that judicial review was merely a product of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). E.g., A. BICKEL, THE LEAST DANGEROUS BRANCH 1-14 (1962). However, as Lawrence Friedman has argued, Marbury, whether or not compelled by the Constitution, followed a period which saw an increasing antipathy toward supreme legislative power. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 107 (1973); see B. SCHWARTZ, supra note 19, at 31-34. This trend, combined with the institutional needs of a federal system and the framers' rejection of congressional interpretive supremacy, see The Federalist No. 22, at 144-46 (A. Hamilton) (J. Cooke ed. 1961), strongly supports the position that Chief Justice Marshall was correct, as a matter of interpretation, in Marbury. Moreover, the framers did provide for a number of checks on the judicial power which, although difficult to effectuate, are viable in combination with other, largely nonlegal, checks on the courts. See Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U. Pa. L. Rev. 810, 848-58 (1974).
64. See authorities cited note 16 supra.
65. See White, supra note 4, at 1213.
66. See The Federalist Nos. 22, 80 (A. Hamilton).
67. See text accompanying note 16 supra.
fied federal judiciary, particularly as to national issues, in support of a centralized judicial authority. The institution, then, takes on a particular character, not only as the final constitutional arbiter, but also as one which, though not infallible, was intended to consist of men particularly well-suited for its task.\(^\text{68}\)

The second line of reasoning relevant in discussing the implication of a constitutional damage remedy concerns the interpretive context of the judicial function. From the time independence was declared, the state constitutions were infused with a clear concern for the protection of individual rights from governmental oppression.\(^\text{69}\) The national Constitution, noteworthy for its generality as to the structure of government, was considerably more specific regarding the individual rights that were to be protected.\(^\text{70}\) Indeed, the original document “could not have been ratified, without the promise of a bill of rights.”\(^\text{71}\) The judiciary’s role as final arbiter of the Constitution would thus be most valid, if accepted at all, in the protection of individual rights.\(^\text{72}\) As Madison argued when introducing the Bill of Rights, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive . . . .”\(^\text{73}\)

Moreover, the descriptive claim for the remedial defense of constitutional liberties rests in an inveterate eighteenth-century advocacy of natural rights.\(^\text{74}\) On certain issues, for example the rights later identified in the fourth amendment, the European experience was transferred to the American revolutionaries.\(^\text{75}\) Controversies surrounding the Stamp Act, the Sugar Act, and the Boston Port Act, on the other hand, gave the colonists first-hand experience leading to a belief that “[i]n all government lay the seeds of tyr-

\(^{68}\) But see McCleskey, Judicial Review in a Democracy: A Dissenting Opinion, 3 Hous. L. Rev. 354, 360-61 (1966), arguing that, at least on normative grounds, the expertise argument is unjustified.

\(^{69}\) See L. Friedman, supra note 63, at 102-03.

\(^{70}\) Id.

\(^{71}\) Id. at 102.

\(^{72}\) J. Choper, Judicial Review and the National Political Process passim (1980). Professor Choper argues that “given the existence of any authority in our counter-majoritarian judiciary to review the constitutionality of political action, it should apply to claimed violations of individual rights.” Id. at 65.

\(^{73}\) 1 Annals of Cong. 457 (Gales & Seaton eds. 1789) (remarks of James Madison).

\(^{74}\) See White, supra note 4, at 1219.

\(^{75}\) See text accompanying notes 23-46 supra.
In response, the framers concluded that only a written constitution would provide the people with an unmistakable bulwark against the violation of individual rights.76

The remedial power endorsed in Bivens, some 200 years after its roots were set, is consistent with both the letter and the spirit of constitutional jurisprudence. British case law, recognized and relied upon by the Supreme Court, provides unambiguous precedent.77 Moreover, the damage remedy is an outgrowth of an era in which the paramount importance of natural rights provided a spark for revolution. The specific institution of a supreme federal tribunal, without institutional precedent in the common law, is itself an indication that constitutional transgressions were to receive the most serious consideration. When the role of the institution, informed by the circumstances of its enactment, is considered, an inevitable conclusion is reached: The judiciary power extends to the provision of damages for the violation of constitutional rights.78

D. Damages as the Least Intrusive Remedy

The historical, institutional, jurisprudential, and precedential foundations offered thus far in support of implying a damage remedy do not address the fiscal ramifications of that remedy. While one might logically argue that fiscal considerations should play no role in the determination of an issue controlled by the Constitution, the damage remedy in cases involving units of government or government officials has had a singular capacity to arouse the ire of defendants. Where state governments or officials are brought into federal court, claims of judicial impingement on federalism are frequently heard.80 Where federal officials are the defendants, the judiciary is often portrayed as seeking to assert itself as the “most equal” of the three branches of the national government.81 In recent years, however, there has been a dawning recognition that the federal judiciary might perform its function in the least intrusive

76. White, supra note 4, at 1219.
77. Id. at 1219-20.
78. See text accompanying notes 23-46 supra.
79. While the arguments offered here concerning the role of the courts in the American system support the implication of a damage remedy from amendments other than the fourth, specific case precedent has been limited to the fourth amendment. For discussion of the propriety of extending the implication beyond that amendment, see pp. 986-1013 infra.
81. See Dellinger, supra note 4, at 1545.
manner by avoiding often large-scale injunctive orders in favor of the damage remedy.\(^8\)

The contemporary notion that injunctive relief is a permissible federal remedy for the violation of constitutional rights, while damages are not, can be traced to the Supreme Court's 1908 decision in \textit{Ex parte Young}.\(^3\) The Court there created the fiction that a state official seeking to enforce an unconstitutional statute was acting outside of his authority and therefore could not claim the protection of the eleventh amendment.\(^4\) The Court thus approved of an injunction although it clearly impacted upon the state.\(^5\) While the case did not involve a claim for damages, the decision has since consistently been interpreted as excluding all types of relief not sanctioned therein; thus damages have been considered an unconstitutional form of relief when the state is the real-party defendant.\(^6\)

The \textit{Ex parte Young} fiction has been recognized as controlling cases involving federal officials.\(^7\) Indeed, its purported holding as

\begin{footnotesize}
\begin{enumerate}
\item See id. at 1543.
\item 209 U.S. 123 (1908).
\item Id. at 159-60.
\item Id. at 161-68.
\item See, e.g., Quern v. Jordan, 440 U.S. 332, 346-49 (1979); Edelman v. Jordan, 415 U.S. 651, 677 (1974). The relief granted in \textit{Ex parte Young} has been characterized as "prospective" in nature. Id. at 664. Since \textit{Ex parte Young}, decisions requiring the expenditure of public funds in the course of conforming to an injunctive or declaratory order have been upheld "as ancillary to the prospective relief" ordered, 440 U.S. at 349, and therefore have not encountered the hostility that awards of damages, even when wholly restitutionary, have encountered. E.g., 415 U.S. at 664-69, 673-78.
\item The Court stated in \textit{Philadelphia Co. v. Stimson}, 223 U.S. 605 (1912), that "[t]he principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. . . . And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred." Id. at 620 (citations omitted). The fiction has since been extended to cover actions seeking damages. In bringing a \textit{Bivens} action, the plaintiff must couch his complaint in terms of the defendant's "individual capacity." "That designation satisfies the fiction which was first adopted in \textit{Ex Parte Young} . . . in order to overcome the impediment of sovereign immunity." Driver v. Helms, 74 F.R.D. 382, 396 (D.R.I. 1977) (citation omitted), aff'd in part, rev'd in part, 577 F.2d 147, rev'd sub nom. Colby v. Driver, 444 U.S. 527 (1980) (decided together with \textit{Stafford v. Briggs}). Thus, in order to prevent judicial interference with fiscal functions, the courts have been content to characterize an official act, completed in the course of employment, as a fictional individual act. See id. Immunities have been developed in partial alleviation of the injustice that results from the concomitant fiction, i.e., that damage awards granted against the government are somehow more intrusive than are other types of relief. For a discussion of various types of immunities and defenses, see pp. 1056-1094 \textit{infra}. See Hill, \textit{Constitutional Remedies}, 69 COLUM. L. REV. 1109, 1139 (1969):
\end{enumerate}
\end{footnotesize}
to the damage issue has permeated constitutional tort litigation and engendered an hostility toward damages as a remedy that is equally applicable whether the defendant is a state or federal official. Of *Ex parte Young*'s progeny, *Edelman v. Jordan*\(^8\) is notable for its portrayal of the damage remedy as a particularly egregious incident of judicial interference with executive and legislative functions.

*Edelman* involved a class suit seeking, *inter alia*, retroactive payment of benefits wrongfully withheld by the State of Illinois pursuant to the federal-state program of Aid to the Aged, Blind, and Disabled.\(^9\) Because payment of these claims did not involve expenses ancillary to the prospective relief also sought in the action, questions concerning federal judicial interference with the state treasury were raised.\(^9\) The Court's holding—against plaintiffs' claim for restitution—was justified primarily on eleventh amendment grounds,\(^9\) though most persuasively on statutory grounds.\(^9\) However, in explaining its reluctance to extend the *Ex parte Young* fiction to monetary relief, the Court stated: "'[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'"\(^9\)

In response to the Court's statement, it might legitimately be asked whether the judicial action sought in *Edelman* was in reality

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\(^8\) 415 U.S. 651 (1974).


\(^9\) 415 U.S. at 664-69, 673.

\(^9\) Id. at 660-69. The eleventh amendment provides that "'[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.'" U.S. CONST. amend. XI.

\(^9\) Id. at 674 ("'[The Aid to the Aged, Blind, and Disabled] provision by its terms did not authorize suit against anyone . . . .'").

\(^9\) Id. at 673 (brackets in original) (quoting Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944) (footnote omitted)).
any less meddlesome than that consequent to injunctive or declaratory relief. In *Milliken v. Bradley*, 94 for example, the Court "approved an injunction ordering a State to pay almost $6 million to help defray the costs"95 of a desegregation order.96 The *Milliken* Court recognized that the *Ex parte Young* line of cases "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."97 Moreover, prior to granting the order that carried with it the six-million-dollar expense, the Court had disallowed a proposed injunctive remedy at least in part because it was "obvious from the scope of the interdistrict remedy itself that . . . the District Court [would have] become first, a de facto 'legislative authority' to resolve . . . complex questions, and then the 'school superintendent' for the entire area."98 Clearly, then, there is little basis for hostility to the damage remedy relative to other types of relief, particularly in the wake of an era that has seen increasing judicial control of activities formerly within the sole province of executive branches of government.99

E. The Damage Remedy: A Hostage of the Tensions of Federalism

Given the potentially greater impact of the injunctive remedy, the late development of legal powers in the redress of constitutional violations seems unjustified on policy grounds. The explanation, however, lies not in policy but in the maturation of the federal system. At the inception of the Republic, the states had mature common law systems.100 In an action for the violation of rights similar to those secured by the fourth amendment, the state action would lie in trespass.101 Given the availability of established methods of dealing with analogous violations, the need for seeking an alternative method of redress was lacking.102

94. 433 U.S. 267 (1977) (*Milliken II*).
95. Hutto v. Finney, 437 U.S. 678, 690 n.15 (1977) (citing 433 U.S. at 293 (Powell, J., concurring in the judgment)).
96. 433 U.S. at 288-91. See generally id. at 277-79.
Moreover, there had been little more than a hint\textsuperscript{103} of constitutional compulsion requiring the states to disregard established procedures in favor of federal standards, at least until the passage of the fourteenth amendment in 1868. The post-amendment process leading to the application to the states of "many of the rights guaranteed by the first eight Amendments"\textsuperscript{104} has been long and arduous, encompassing seventy-two years thus far.\textsuperscript{105} It is less than surprising, therefore, that the initiation of a damage remedy for the violation of rights originally considered solely federal in application did not come in state courts.

The late development of the same remedy in federal courts is a product of several related circumstances. First, it was not until 1875 that the inferior federal courts were granted original jurisdiction in private civil litigation arising under the Constitution.\textsuperscript{106} Second, although the states had mature common law systems at the time the Judiciary Act of 1789 was passed, their equitable powers remained largely underdeveloped.\textsuperscript{107} The first Congress sought to fill the remedial gap by vesting equitable powers in the federal judiciary.\textsuperscript{108} For nearly two-hundred years thereafter it was commonly assumed that equitable remedies were "to be freely given, seemingly as a matter of constitutional right"\textsuperscript{109} by the federal courts. However, it was likewise assumed that suits at law, even

\textsuperscript{103} But see text accompanying notes 52-55, 61-63 \textit{supra}.

\textsuperscript{104} Duncan v. Louisiana, 391 U.S. 145, 148 (1968). For a list of those provisions of the Bill of Rights that have been "selectively" incorporated, see L. \textit{Tribe}, \textit{supra} note 1, § 11-2, at 567-68 & nn.7-24.

\textsuperscript{105} The first Supreme Court case utilizing the fourteenth amendment to invalidate state legislation, in this instance on due process and commerce grounds, was Allgeyer v. Louisiana, 165 U.S. 578 (1897). L. \textit{Tribe}, \textit{supra} note 1, § 8-1, at 434. The process of selective incorporation of the provisions of the Bill of Rights began later that term with Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897) (fifth amendment right to compensation), and has most recently been extended in Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment right against double jeopardy).


\textsuperscript{107} See Fisher, \textit{supra} note 16 (explaining circuitous development of equity powers in Pennsylvania); Woodruff, \textit{supra} note 100 (explaining circuitous development of equity powers in Massachusetts).

\textsuperscript{108} The extent of congressional concern with equity powers is evidenced by the enactment in 1792 of another statute, Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, which, although it did not increase the federal equity power ordained by the Judiciary Act of 1789, reemphasized congressional concern that the common law powers existing in the British chancery courts were to be utilized in American federal courts. See Fisher, \textit{supra} note 16; Woodruff, \textit{supra} note 100.

\textsuperscript{109} Hill, \textit{supra} note 87, at 1111.
where the defendants were federal officials, were governed by state law. Thus, even after the grant of original jurisdiction to the inferior federal courts in 1875, the development of legal remedies in federal court for the violation of constitutional rights succumbed to heavy historical baggage. And as already discussed, the weight grew even heavier with the addition in 1908 of Ex parte Young's implied dictum.

The damage remedy, then, can be seen as a hostage of the federal structure that was left unrescued until the Bivens decision in 1971. Interestingly, Bivens was decided 100 years after section one of the Civil Rights Act of 1871 (the present section 1983) had authorized damage actions against state and local officials for violation of federal constitutional rights. Just as the Civil Rights Act was a response to pre- and post-Civil War era abuses, the Bivens action is properly viewed as a response to the pre- and post-Revolution recognition that government held the power to violate individual rights. That this recognition was not allowed a remedy for two-hundred years is clearly a product of the tensions of federalism, tensions intended to produce a workable distribution of power in a dual judiciary system. In this case, however, the state systems failed because they relied on analogous—but most often insufficient—common law remedies. The failure of the national judiciary was in the difficulty of reconciling its perhaps contradictory roles in two areas of constitutional law. The Constitution of 1789 called for a central government of limited powers. The Bill of Rights, enacted two years later, demanded an institution capable of vigorous enforcement. Marbury signaled the Supreme Court's ascendancy on intergovernmental issues. The Court was also active in its early years where questions of uniquely federal concern, particularly commerce disputes, had arisen. However, in the area of individual rights, which lacked the special federal focus presented by commerce questions, the Court lay dormant. It took

111. See text accompanying notes 75-79 supra.
113. See Hill, supra note 87, at 1120-24, 1127.
114. J. CHOPER, supra note 72, passim.
115. 5 U.S. (1 Cranch) 137 (1803).
117. L. TRIBE, supra note 1, § 1-2, at 2-3.
one-hundred years,\textsuperscript{118} a war, and a fresh set of amendments, before the Court was able to develop a jurisprudence capable of fulfilling the promise of 1791 without rekindling the fears of 1789. The danger of an omnipotent central authority had become ingrained on a system’s consciousness.

\textbf{F. Imposing Remedies From Statutes}

The proposition that the late development of a constitutional damage remedy is a result of the tensions of federalism, and not of a perceived inherent limitation on the judiciary’s remedial power, is strengthened in light of the well-settled judicial practice of imposing remedies from statutes. Anglo-American precedent was established in 	extit{Couch v. Steel},\textsuperscript{119} where a seaman was awarded damages from the owner of a ship upon which he had sailed. The owner had failed to keep adequate medical supplies on board in breach of a statutory duty. Violation of the statute was punishable by fine; however, the fine was recoverable by only a common informer, not by the aggrieved party.\textsuperscript{120} The plaintiff, who had taken ill on board, brought private suit on statutory grounds.\textsuperscript{121} The court relied upon the general rule that “where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages.’ ”\textsuperscript{122} Chief Justice Campbell, however, went on to state that where a statute is enacted for the protection of a class of persons, and through violation of the statute a member of the protected class is injured, that individual shall have a remedy.\textsuperscript{123} Although this principle has been largely abandoned by British courts,\textsuperscript{124} the precedent established has become an important principle of American remedial law,\textsuperscript{125} first given the Supreme Court’s approval in 1916.\textsuperscript{126}

\textsuperscript{118} E.g., 	extit{Ex parte} Young, 209 U.S. 123 (1908) (upholding federal invalidation of state legislation on due process grounds).
\textsuperscript{119} 118 Eng. Rep. 1193 (Q.B. 1854).
\textsuperscript{120} Id. at 1198.
\textsuperscript{121} Id. at 1196.
\textsuperscript{122} Id. (quoting 1 Comyn, Digest of the Laws of England tit. Action Upon Statute (F)).
\textsuperscript{123} Id. at 1196-97.
\textsuperscript{124} Williams, The Effect of Penal Legislation in the Law of Tort, 23 Mod. L. Rev. 233, 245 (1960).
\textsuperscript{126} Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916): “[D]isregard of the command of the statute is a wrongful act, and where it results in damage to one of
Since 1916 the Court has consistently affirmed its power to imply a private cause of action in order to effectuate the underlying purposes of federal legislation. In *Cort v. Ash*, where the Burger Court unanimously declined to exercise this power, four factors governing the relevant inquiry were set forth:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?\(^2\)

Application of the *Cort* standards would seem to benefit constitutional tort plaintiffs. As to the first requirement, the *Cort* majority itself cited *Bivens* as an example of "a clearly articulated federal right in the plaintiff . . . ."\(^1\)\(^3\) The second standard allows courts to defer to the intent of the enacting body. One would be hard pressed to find any intent of the framers—either implicit or explicit—to deny a private cause of action. Conversely, the Court in *Boyd v. United States* recognized that the precedent of the *Wilkes* and *Entick* cases was "in the minds of those who framed the Fourth Amendment . . . ."\(^2\)\(^3\) While the damage remedy was not explicitly provided for, examination of the history and purpose of the Bill of Rights fairly leads to the conclusion that the damage

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3. Id. at 78 (emphasis in original) (citations omitted) (quoting Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916)).

127. Id. at 83; see Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts* in Bell v. Hood, 117 U. PA. L. REV. 1, 41 (1968); "Remedial implementation is universally meaningful because the class of persons who are the holders of these interests is coextensive with the political society."

131. The cases are discussed at text accompanying notes 25-51 *supra*.

132. 116 U.S. 616, 626-27 (1885).
remedy was implicitly sanctioned.\textsuperscript{133} On the third count, the damage remedy is consistent with the deterrence goals of the Bill of Rights and, if one accepts that common law precedent influenced the drafting of the original amendments, the remedy furthers the implicit compensatory purpose as well.

The fourth standard addresses federalism concerns. As previously discussed,\textsuperscript{134} the provision for original jurisdiction in state courts only cannot be assumed to have been a limitation on the substantive incidents of federal rights. Thus, constitutional tort actions are not of the type "traditionally relegated to state law."\textsuperscript{135} Moreover, an examination of whether individual rights is "an area basically the concern of the states,"\textsuperscript{136} must yield a conclusion in the negative. Even if one were to suggest that such rights were initially local in character, the fourteenth amendment forever altered the inquiry.\textsuperscript{137}

Given the ease of applying the \textit{Cort} standards to constitutional torts, "[t]he argument that the Constitution, as law in courts, ought to be treated as any other body of legal rules should not prove disconcerting."\textsuperscript{138} Indeed, those who would argue that the judiciary should be most vigilant in protecting individual constitutional rights\textsuperscript{139} might well suggest that the judicial power should be less restricted when the remedy sought to be implied is derived from the Constitution. The Court came to this conclusion in \textit{Davis v. Passman},\textsuperscript{140} rejecting the application of the \textit{Cort} standards to constitutional remedies.\textsuperscript{141} That decision is the most definite indication from the Court that it perceives its role in the protection of constitutional rights as intrinsically justified. The presence of federal legislative policy or state policy notwithstanding, \textit{Davis} and its progeny\textsuperscript{142} make it clear that only principles of comity and convenience of process appropriately influence the exercise of judicial discretion. Where questions of constitutional rights are involved, "the

\begin{itemize}
  \item \textsuperscript{133} See text accompanying notes 25-79 \textit{supra}.
  \item \textsuperscript{134} See text accompanying notes 52-55 \textit{supra}.
  \item \textsuperscript{135} 422 U.S. at 78; text accompanying note 129 \textit{supra}.
  \item \textsuperscript{136} 422 U.S. at 78; text accompanying note 129 \textit{supra}.
  \item \textsuperscript{137} See, e.g., L. \textit{TRIBE}, \textit{supra} note 1, § 1-3.
  \item \textsuperscript{138} Katz, \textit{supra} note 130, at 39.
  \item \textsuperscript{139} E.g., J. Choper, \textit{supra} note 72 passim.
  \item \textsuperscript{140} 442 U.S. 228 (1979).
  \item \textsuperscript{141} \textit{Id.} at 240-44. The case is discussed at pp. 987-994 \textit{infra}.
  \item \textsuperscript{142} See Carlson v. Green, 446 U.S. 14, 18-25 (1980); \textit{Id.} at 25-30 (Powell, J., concurring in the judgment, joined by Stewart, J.); pp. 994-1004 \textit{infra}.
\end{itemize}
judiciary is clearly discernible as the primary means through which these rights may be enforced."\textsuperscript{143}

G. The Value of a Normative Foundation: Self-imposed Limits on the Cause of Action

In 1980, long after the \textit{Bivens} action had become a popular avenue for federal court suit,\textsuperscript{144} Justice Rehnquist wrote in \textit{Carlson v. Green}\textsuperscript{145} that "to dispose of this case as if \textit{Bivens} were rightly decided would in the words of Mr. Justice Frankfurter be to start with an 'unreality.'"\textsuperscript{146} Justice Rehnquist, notwithstanding the passage of time and the creation of a substantial body of federal law, would have overruled \textit{Bivens} "as a result of its weak precedential and doctrinal foundation . . . ."\textsuperscript{147} In contrast, the Court itself has stated that prior decisions, particularly those dealing with constitutional issues, should not be overturned without the presentation of new information proving the earlier opinion incorrect beyond peradventure.\textsuperscript{148} The view offered by Justice Rehnquist, however, does present an important point: The \textit{Bivens} opinion was doctrinally weak, attempting to bootstrap a valid result into a line of precedent that simply did not exist.\textsuperscript{149} The Court went a significant distance to rectify this in \textit{Davis v. Passman},\textsuperscript{150} where it eschewed the descriptive arguments—that the judiciary had always (at least implicitly) sanctioned similar actions—for normative arguments—that even if the cause of action had not previously been sanctioned, it should have been and still should be. Indeed, the establishment of a normative role for the judiciary has attracted the attention of the nation's most significant constitutional scholars in recent years.\textsuperscript{151}

Few, if any, would suggest that the Court has no appropriate interpretive role. Justice Rehnquist has recognized that the Court is necessarily involved in "the living process of striking a wise balance between the need to ensure that "public duties are effectively performed and the need that the public not be dishonored by being made the \textit{punch line of a bad joke."}\textsuperscript{152}

\begin{footnotes}
\item 143. 442 U.S. at 241.
\item 144. See pp. 1004-1013 infra.
\item 145. 446 U.S. 14 (1980).
\item 146. \textit{Id.} at 32 (Rehnquist, J., dissenting) (quoting Kovacs v. Cooper, 366 U.S. 77, 89 (1949) (Frankfurter, J., concurring)).
\item 147. \textit{Id.} (Rehnquist, J., dissenting).
\item 149. See pp. 976-986 infra.
\item 150. 442 U.S. at 241-42, 245.
\item 151. E.g., J. Choper, supra note 72; J. Ely, Democracy and Distrust (1980); Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975).
\end{footnotes}
ance between liberty and order as new cases come here for adjudication.' Terms such as "judicial legislation," therefore, more appropriately describe the excesses of judicial action, not the fact of the action. Accordingly, the advocate of an activist position must provide normative foundations that not only define a basis for the action sought but also reveal standards that intrinsically limit the judiciary's role.

For the advocate of the *Bivens* cause of action, the starting point must be the intent of the framers. In establishing a system of government, the framers encountered a dilemma: How could the rights of the people be protected without establishing a body that held the power to violate, as well as protect, those rights? The institution of the Supreme Court was intended to answer that question. A supreme federal tribunal, separate and distinct from the traditional legislative and executive branches of government, was to check the authority of the policymaking bodies insofar as the Constitution indicated the substance of rights to be protected. The question of remedial authority cannot be in significant doubt, aside from the vagaries of history, for to allow that the judiciary is beholden to the legislature for its remedial power in an otherwise valid exercise of authority is to denigrate "the wise balance between liberty and order." If, as Madison suggested, the judiciary is charged with the protection of the Bill of Rights "against every assumption of power in the legislative or executive," the prerequisite of legislative approval of traditional judicial activity must be normatively unsound, regardless of its descriptive content.

The foundation offered in this section for the judicial role is self-limiting. It does not justify the protection of rights not provided for by the framers and it does not allow for the creation of remedies (e.g., criminal penalties) that have not been within a federal court's discretion since article III granted jurisdiction to the Supreme Court over "all Cases, in Law and Equity, arising under this Constitution . . . ." The logical extension of its thesis—and the limit of its reach—is the provision of damages, where they have traditionally been appropriate, for the violation of an individual's constitutional rights. Whether the courts have seen fit to exercise this power so defined is the subject of the next section.

152. Carlson v. Green, 446 U.S. at 32 (Rehnquist, J., dissenting).
153. 1 ANNALS OF CONG. 457 (Gales & Seaton eds. 1789) (remarks of James Madison).
III. SUBSTANTIVE DEVELOPMENT

This section will analyze both the creation and subsequent development of a Bivens cause of action—a judicially created damage remedy against federal officials who violate an individual's constitutional rights.1 The necessary prerequisite to the action itself, the recognition that the federal courts have subject matter jurisdiction in actions seeking damages for the violation of constitutional rights, was not realized until the Supreme Court's 1946 decision in Bell v. Hood.2 Twenty-five years later, the Court inferred the remedy directly from the Constitution in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.3 The decision further effectuated the fourth amendment right to be free from unreasonable search and seizure, advancing goals of compensation for plaintiffs suffering injury to constitutionally protected rights and deterrence of unconstitutional conduct of federal officials.4

In the ten years since Bivens its reasoning has been extended to other constitutional provisions.5 The Supreme Court has provided the lower courts with an analytical framework to guide the expansion of a Bivens cause of action to other constitutionally protected rights6 and has resolved related issues of choice of law and exclusivity of remedy.7 The relationship between the judicially created Bivens remedy and its statutory analogue, section 1983,8

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2. 327 U.S. 678 (1946).
4. See text accompanying notes 123-135 infra.
5. See text accompanying notes 143-322 infra.
8. The statute provides:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

which authorizes damage actions against state officials who violate constitutional rights, has played an important role in the development of *Bivens* in the federal courts. Since section 1983 and *Bivens* serve similar goals, the merits of applying section 1983 precedent to *Bivens* actions will be addressed in this section. The question of the requisite mental state, yet to be addressed by the Supreme Court, will be analyzed in light of the *Bivens*-section 1983 interplay. Finally, the original policy goals and the reasoning of *Bivens* will be reexamined in light of subsequent case law in an effort to determine the future of the cause of action.

A. The Right is Recognized: Bell v. Hood

In *Bell v. Hood*, the plaintiff brought suit in the District Court for the Southern District of California, alleging a conspiracy by officials of the Federal Bureau of Investigation to violate his fourth and fifth amendment rights. Invoking the court's federal question jurisdiction, the complaint presented the novel issue whether damages were available consequent to a violation by federal officials of the constitutional right to be free from unreasonable search and seizure. The district court, in an unpublished order, dismissed the suit for lack of subject matter jurisdiction. Bell appealed to the Court of Appeals for the Ninth Circuit, which affirmed the district court. In the Court of Appeals' opinion, the case did not "arise under the Constitution or laws of the United States," because there was neither a statutory basis nor an ex-

10. Complaint at 2, 6-7.
12. 327 U.S. at 684.
13. *Bell v. Hood*, 150 F.2d 96, 98-99 (9th Cir. 1945), rev'd, 327 U.S. 678 (1946). The fourth amendment provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.
14. No. 2850-RJ Civil (S.D. Cal., Apr. 24, 1944) (order dismissing complaint); see *Bell v. Hood*, 150 F.2d at 97.
15. 150 F.2d at 100.
16. *Id.* (citations omitted) (footnote omitted).
press constitutional provision allowing recovery of damages from federal officials for the violation of fourth amendment rights.

The Supreme Court granted certiorari\textsuperscript{17} and subsequently reversed the court of appeals.\textsuperscript{18} In a 1946 opinion by Justice Black, the Court reasoned that a complaint alleging the violation of a constitutional right by federal officials is the paradigm of an action "arising under the Constitution of the United States,"\textsuperscript{19} for the right to recovery will depend upon the construction of applicable constitutional provisions.\textsuperscript{20} Justice Black explained that the two lower courts had confused the question of the presence of subject matter jurisdiction with the analytically distinct inquiry of what remedy would be available once jurisdiction was assumed.\textsuperscript{21} Thus the Supreme Court held that subject matter jurisdiction would always exist for such a claim, unless it was "made solely for the purpose of obtaining jurisdiction [or was] wholly insubstantial and frivolous."\textsuperscript{22} The district court was directed to assume jurisdiction to determine whether the plaintiff had stated a claim for which relief could be granted.\textsuperscript{23}

On remand, the district court again dismissed, this time for failure to state a claim on which relief could be granted.\textsuperscript{24} The court noted that the complaint sought relief against the officers as individuals, claiming that they were not acting in a governmental capacity at the time of the search.\textsuperscript{25} However, the court reasoned that the Constitution purports to limit only the actions of the federal government, and not individual action;\textsuperscript{26} consequently, a claim for monetary relief against individuals could not be based directly on the Constitution.\textsuperscript{27} In the absence of governmental authorization of the officials' actions or a federal statute conferring a right to sue such officers for damages in their individual capacities, the court was without a basis upon which relief could be granted.\textsuperscript{28}

\begin{itemize}
  \item \textsuperscript{17} 326 U.S. 706 (1945).
  \item \textsuperscript{18} 327 U.S. 678, 685 (1946).
  \item \textsuperscript{19} \textit{Id.} at 684.
  \item \textsuperscript{20} \textit{Id.} at 685.
  \item \textsuperscript{21} \textit{Id.} at 682.
  \item \textsuperscript{22} \textit{Id.} at 682-83.
  \item \textsuperscript{23} \textit{Id.} at 685.
  \item \textsuperscript{24} 71 F. Supp. 813, 821 (S.D. Cal. 1947).
  \item \textsuperscript{25} \textit{Id.} at 815.
  \item \textsuperscript{26} \textit{Id.} at 817-18.
  \item \textsuperscript{27} \textit{Id.} at 818-19.
  \item \textsuperscript{28} \textit{Id.} at 820-21.
\end{itemize}
Since the plaintiff asserted a federal question giving rise to section 1331 jurisdiction, and no other provision of federal law allowed the requested relief, the district court was squarely confronted with the question the Supreme Court had not reached: Were damages to be available in an action brought in the federal courts against federal officials, implied directly from the Constitution? As the court answered in the negative, Bell was left entirely without a remedy in the federal courts. The Bell remand has often been cited as precedent by other federal courts in dismissing similar constitutional claims. This restrictive reading of Bell, although widely accepted, ignored the Supreme Court's earlier statement that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." The Court's jurisdictional statement became an empty promise for a plaintiff seeking damages to redress the violation of a constitutional right by federal officials. Access to the federal courts was pointless if no judicial remedy existed for the redress of a plaintiff's otherwise legitimate cause of action. Given the existence of federal jurisdiction recognized in Bell, the Supreme Court was faced with the question of inferring a damage remedy directly from the Constitution if the exercise of federal jurisdiction was to be meaningful. It was not until 1971 that the Court chose to answer the question.

29. Id. at 820. The court also dismissed Bell's state law claims. Id. At the time Bell was remanded in 1947, the leading case on pendent jurisdiction was Hum v. Oursler, 289 U.S. 238 (1933). The Court in Hum held that a federal court still retains jurisdiction of a pendent state claim if it was brought before the court with a federal question which constituted a distinct ground of recovery. Id. at 246. By allowing a plaintiff whose suit involved both federal and state law, based on a single cause of action, to be heard on both claims in federal court, the decision implicitly espoused a philosophy of judicial economy, advanced litigant convenience, and avoided res judicata problems. See Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018, 1019 (1962). The district court in Bell limited the Hum doctrine to equity. 71 F. Supp. at 820.


31. 327 U.S. at 684 (footnote omitted).


33. Bivens has been the subject of extensive scholarly comment. See, e.g., Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1332 (1972); Lehmann, Bivens and Its Progeny: The Scope of a Constitutional Cause
B. The Right in Search of a Remedy: Bivens v. Six
Unknown Named Agents of the Federal Bureau of Narcotics

1. Bivens in the lower federal courts.—In a fact situation remarkably similar to Bell, Webster Bivens alleged in his complaint that he was arrested without warrant or probable cause by agents of the Federal Bureau of Narcotics. The agents searched Bivens' entire apartment, manacled him in front of his wife and children, and then threatened to arrest them as well. Bivens claimed that he was taken to a station house where he was booked, fingerprinted, interrogated, and stripsearched; he was later released without charges having been filed against him. Bivens demanded damages from the agents in compensation for the violation of his fourth amendment rights. The District Court for the Eastern District of New York dismissed for lack of subject matter jurisdiction and on the alternative ground that the plaintiff had failed to state a claim upon which relief could be granted.

On appeal, the Second Circuit, in a correct statement of the law as it existed at that time, reversed the district court on the first ground, citing Bell for the proposition that the federal courts have subject matter jurisdiction over such claims. However, the court affirmed on the alternative ground that the complaint had failed to state a claim upon which relief could be granted. The court of appeals rejected the argument that the fourth amendment—which had always been used to shield individuals from government action—could now be used affirmatively, as a sword, by individuals against federal officials.

The court's opinion conceded that it was desirable to read the congressional grant of federal question jurisdiction broadly, so that the courts would have the power to infer a damage remedy to


34. Complaint at 1 (filed pro se).
35. Id. at 2.
37. Id. at 13, 16.
38. Id. at 16.
40. Id.
41. Id. at 724.
42. See id. at 722. The court of appeals noted that a constitutional damage remedy could be inferred in much the same way that damage actions are inferred from
prevent the fourth amendment guarantee from being reduced to a "mere 'form of words.'" The court also noted that traditionally available remedies might "not provide a totally effective enforcement scheme for Fourth Amendment rights" in the situation presented. Criminal prosecution of the officers was possible, but rarely practical. In the event that a civil suit was brought in state court, exemplary damages or recovery for emotional injury would be allowed under New York tort law only after actual injury, such as physical damage to Bivens' apartment in the course of the arrest and search, was proved. Yet the gravamen of Bivens' complaint was that his constitutional right to be free from unreasonable search and seizure had been violated. A state action sounding in tort could not grant damages that would realistically compensate an invasion of personal liberty guaranteed by the Constitution, as a common law tort action is not designed to allow recovery for intangible injuries, such as those to personal liberty interests, which are federally (and interstitially) guaranteed by the Constitution.

Despite the admitted inadequacy of this remedial scheme to vindicate Bivens' rights, the circuit court viewed the panoply of available remedies as sufficient in most cases to render the constitutional right of freedom from unreasonable search and seizure

statutes not expressly so providing. Id.; see pp. 965-968 supra. The focus of the statutory inquiry is, generally, whether creation of the remedy furthers legislative intent. See 409 F.2d at 722 (quoting Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 181 (2d Cir.), cert. denied, 385 U.S. 817 (1966)). However, the Court has held that the focus changes when the implication for the remedy derives from the Constitution. See Davis v. Passman, 442 U.S. 228, 240-44 (1979). For a discussion of Davis, see text accompanying notes 143-185 infra.

43. 409 F.2d at 723 (quoting Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

44. Id. at 725.

45. Declaratory relief, a theoretical possibility, would be practically impossible because Bivens could not reasonably anticipate the future violation of his constitutional rights. Injunctive relief would also be inappropriate as it was unlikely that such a search would recur in a regular pattern. See generally Butz v. Economou, 438 U.S. 478, 504-05 (1978); 409 F.2d at 723. The exclusionary rule was of course inapplicable since Bivens was never charged with a crime in connection with the search. See Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).


48. Brief for Petitioners at 37-39. New York tort law suggests that the question of compensation be left to the jury to weigh the policy considerations involved. Id.

49. See text accompanying notes 260-263 & sources cited note 261 infra.
The court declined to act, believing the standard for judicial creation of a new remedy directly from the Constitution to be one of necessity, at least in the absence of congressional authorization.

2. The Supreme Court Opinion.—The Supreme Court granted certiorari and later reversed the decision of the court of appeals on June 21, 1971. Justice Brennan, writing for the majority (Justices Douglas, Stewart, White, and Marshall), held that a damage remedy could be inferred directly from the Constitution against a federal official for the violation of fourth amendment rights, even in the absence of legislation specifically authorizing the courts to do so. Justice Harlan concurred in the judgment in a separate opinion; Chief Justice Burger and Justices Black and Blackmun dissented.

Both the majority and concurring opinions specifically rejected the government's argument that Bivens' only proper avenue of redress was suit in state court, based on common law tort, removable by the defendants under statute to federal court. Bivens, then, must have had a federally protected right, arising independently of state law, on which to base his suit in federal court. The source of this right was deduced by the majority in the following manner:

[Just as state law may not authorize federal agents to violate the Fourth Amendment... neither may state law undertake to limit the extent to which federal authority can be exercised.... The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible de-

50. 409 F.2d at 725.
51. Id. at 726. The necessity standard was explicitly overruled by the Supreme Court. Bivens, 403 U.S. at 397.
54. Id. at 389.
55. Id. at 398 (Harlan, J., concurring in the judgment).
56. Id. at 411 (Burger, C.J., dissenting).
57. Id. at 427 (Black, J., dissenting).
58. Id. at 430 (Blackmun, J., dissenting).
59. Id. at 390-97; id. at 400 (Harlan, J., concurring in the judgment).
60. Id. at 391. 28 U.S.C. § 1442 (1976) provides for removal to the federal system of suits that could not originally have been filed in a federal court. See generally Willingham v. Morgan, 395 U.S. 402 (1969). At the time of Bivens, the Justice Department routinely took advantage of the removal provision. 403 U.S. at 391 n.4.
61. For a discussion of the early roots of this federal right in English and American common law, see pp. 952-956 supra.
fense to the state law action, but an independent claim both necessary and sufficient to make out plaintiff's cause of action. 62

As to the availability of damages, the majority implicitly rejected the high standard espoused by the court of appeals: "The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." 63

Justice Harlan's discussion in concurrence also deduced the existence of a federal right without reference to state law. 64 In Justice Harlan's view, Bivens had a constitutionally protected interest in remaining free from unreasonable search and seizure. Justice Harlan believed that since the federal courts had traditionally granted equitable relief to vindicate fourth amendment rights without any congressional authorization more specific than the general federal question jurisdiction contained in section 1331, vindication of these interests was not exclusively in the hands of Congress. 65

As specific congressional authorization is not necessary to empower the federal courts to grant equitable relief for violations of constitutional rights, then neither is it a prerequisite to a damage remedy. The decision to grant or withhold damages is, he reasoned, within the discretion of the Court. 66

The analyses of the majority and concurring opinions require the identification of an appropriate standard to guide judicial action. Starting from the premise that the federal courts are of limited jurisdiction, the government had argued that the creation of new remedies is a task best left to the legislature, the branch of government charged with the responsibility of making the policy judgments that inform the application of the law. 67 Thus, the government saw an extremely narrow role for the judiciary. In the absence of congressional authorization, relief should be granted only

62. 403 U.S. at 395 (citations omitted).
63. Id. at 397 (citations omitted).
64. Id. at 400 (Harlan, J., concurring in the judgment).
65. Id. (Harlan, J., concurring in the judgment).
66. Id. at 405 (Harlan, J., concurring in the judgment). But cf. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275 (federal equitable relief authorized by Congress). Justice Harlan felt that this authorization was superfluous. 403 U.S. at 404 (Harlan, J., concurring in the judgment).
where it is “indispensable for vindicating constitutional rights.”68 Pointing to alternative remedies then available in fourth amendment cases, the government argued that a federal damage remedy was unnecessary for the vindication of Bivens’ rights.69 The propriety of the damage remedy was not itself relevant; rather, the government believed that the application of a more traditional remedy would constitute less drastic, and therefore more appropriate, judicial activism.

Justice Harlan disagreed. Rejecting the proposed “essentiality test,”70 he viewed the correct standard for implying a damage remedy in a constitutional case to be “whether compensatory relief is ‘necessary’ or ‘appropriate’ to the vindication of the interest asserted.”71 and recalled the judiciary’s “particular responsibility to assure the vindication of constitutional interests.”72 Justice Harlan also disagreed with the government’s contention that alternate remedies were adequate, stating that “[f]or people in Bivens’ shoes, it is damages or nothing.”73

Justice Harlan’s approach is unsatisfactory in that his reliance on an equitable-legal analogy is flawed.74 While the federal courts have traditionally granted equitable relief in constitutional cases, they have statutory authority to do so as a result of an Act of Congress75 responding to the underdevelopment of equity in the state court systems in the early days of the republic.76 Congress has not similarly empowered the federal courts to grant relief in damages for constitutional violations. Although Congress granted the inferior federal courts jurisdiction over federal questions in 1875,77 that ac-

68. Id. at 24.
69. Id. at 25-32.
70. 403 U.S. at 406 (Harlan, J., concurring in the judgment).
71. Id. at 407 (Harlan, J., concurring in the judgment) (citations omitted). This standard is derived from United States v. Standard Oil Co., 332 U.S. 301 (1947). There, the United States brought suit against the owner and driver of a truck who had injured a soldier in the army. 60 F. Supp. 807, 808-09 (1945). The issue was the power of the federal courts to create common law on exclusively federal matters after Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The Court held that where necessary or appropriate, the courts retained their common law power to deal with federal problems. 332 U.S. at 310-11 (distinguishing Erie).
72. 403 U.S. at 407 (Harlan, J., concurring in the judgment).
73. Id. at 410 (Harlan, J., concurring in the judgment).
74. Id. at 405 (Harlan, J., concurring in the judgment).
76. See pp. 962-965 and authorities cited note 100 supra.
77. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (current version at 28 U.S.C.
tion alone created no new causes of action. Thus, for those who see the proper role of the federal courts as extremely circumscribed, Justice Harlan had not justified the *Bivens* result as a simple exercise of federal remedial discretion. Absent a justification of the judiciary’s role apart from congressional action, the *Bivens* result would stand as an example of judicial legislation rather than judicial effectuation of the framers’ intent—an appropriate exercise of the judicial function.

The majority’s attempt at justifying the Court’s action was equally unconvincing. Justice Brennan, writing for the Court, summarily rejected the essentiality standard, stating that “[t]he question is merely whether petitioner . . . is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.” Justice Brennan attempted to explain the Court’s function by reference to precedent. First, he discussed the tradition of awarding damages consequent to a deprivation of a personal liberty interest. However, his citation of four voting-rights cases in evidence of the tradition was unavailing. In none of the cited cases did the Court authorize or sanction a damage award. *Wiley v. Sinkler* was a damage action consequent to a denial of the right to vote in a congressional election. The Supreme Court held that such an action arose under the Constitution, in spite of the fact that a voter’s qualifications are determined by state law, because the right to vote “has its foundation in the Constitution.”

The Court affirmed the dismissal of the complaint, however, because the plaintiff had failed to allege that he was registered to vote when his ballot was refused. In its only reference to the damage remedy, the Court asserted that the amount of damages sought satisfied the then-requisite amount in controversy. Like *Bell v. Hood*, *Wiley* addresses the right but not the remedy. *Swafford v.*

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79. See pp. 948-969 supra.

80. 403 U.S. at 397.


82. 179 U.S. 58 (1900).

83. *Id.* at 60.

84. *Id.* at 64-65.
Templeton, presenting substantially the same jurisdictional issue, was decided on the authority of Wiley. While both cases recognized the plaintiff's right to a federal forum, neither reached the question of the propriety of the damage remedy sought.

In Nixon v. Herndon, a black man was denied the right to vote on the basis of a state statute prohibiting blacks from voting in a Democratic party primary election. Although the plaintiff sought damages, the Court struck down the statute as violative of equal protection under the fourteenth amendment. In Nixon v. Condon, the same plaintiff sought damages after Texas had repealed the statute declared unconstitutional in Herndon and replaced it with new legislation enabling a "State Executive Committee" of the Democratic party to exclude blacks from party membership. As the Court noted, an identical result had thus been achieved merely by substituting a different entity. Rejecting an argument that the new arrangement did not constitute state action, the Court struck down the revision on equal protection grounds. In neither case did the Court address the question of relief in damages. Thus, the four voting-rights cases do not support the proposition, put forward by Justice Brennan, that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."

Surprisingly, these cases, which merely recognized a right redressable in a federal forum, substitute for a discussion of the historical roots of the damage action itself in British and American common law. Entick v. Carrington and Wilkes v. Wood, landmark British cases that recognized a damage action for violation of privacy interests later to be protected by the fourth amendment, received only indirect mention in the majority opinion. Boyd v. United States, an early recognition by the Supreme Court of the

85. 185 U.S. 487 (1902).
86. 273 U.S. 536 (1927).
87. Id. at 540-41.
88. 286 U.S. 73 (1932).
90. 286 U.S. at 89.
91. 403 U.S. at 395.
94. 403 U.S. at 396 (citing N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43-50 (1937) (discussing development of "fourth amendment" interests in British law prior to revolution)).
95. 116 U.S. 616 (1886).
damage remedy for fourth amendment violations, although cited in
the brief for petitioner, was not mentioned at all by the Court.

Justice Brennan also cited Marbury v. Madison, for the
proposition that for every right there must be a remedy. While Marbury does indeed state that "[t]he very essence of civil liberty
certainly consists in the right of every individual to claim the pro-
tection of the laws, whenever he receives an injury," the state-
ment standing by itself is misleading. In Marbury the question was
whether one who had received a federal commission should have
the right to force the executive, through the courts, to grant him
his position. Marbury, of course, upheld the propriety of judicial
review in that instance; however, the opinion is silent on the scope
of available remedies in federal courts for violation of protected in-
terests. Inasmuch as Bell v. Hood unquestionably established the
jurisdiction of the federal courts to hear a damage claim against a
federal official for a fourth amendment violation, the quotation
from Marbury added nothing to the majority's discussion. The
Marbury citation, like that of the voting-rights cases, provides little
guidance to a court seeking to define the scope, as opposed to the
existence, of its remedial power. In sum, Justice Brennan's conten-
tion that a damage remedy is within the jurisdiction of the federal
courts, while most likely correct, is essentially unsupported in
the opinion.

The true justification for Bivens lies instead in its effectuation
of the substantive rights intended by the framers to be part and
parcel of the fourth amendment. In Webster Bivens' case the only
avenue open to the Court, consistent with its normative role, was
the authorization of a traditional remedy to fill a gap in a federal
remedial scheme. The decision can be easily understood as the

96. Brief for Petitioners at 9, Bivens, 403 U.S. 388 (1971); see pp. 952-956 su-
pra.
97. 5 U.S. (1 Cranch) 137 (1803).
98. Id. at 163 (quoted in 403 U.S. at 397).
99. Id. at 154.
100. 327 U.S. 678 (1946); see text accompanying notes 9-33 supra.
101. See pp. 948-969 supra.
102. The Supreme Court has filled such constitutional gaps on more than one
occasion. Perhaps the clearest example is the exclusionary rule, which prohibits at
criminal trials the introduction of evidence seized in violation of a suspect's fourth
amendment right to be free from unreasonable search and seizure. Weeks v. United
States, 232 U.S. 383 (1914). The rule was made applicable to the states in Mapp v.
Ohio, 367 U.S. 643 (1961). In the context of fifth amendment rights, Miranda v.
Arizona, 384 U.S. 436 (1966), instituted the now-famous Miranda warnings, which,
by informing a criminal suspect at the time of arrest of the right to remain silent and
to have counsel, are designed to avoid unintentional waivers of these rights. In the
Court's response to its constitutional duty to protect individual constitutional rights.\textsuperscript{103}

The majority, finding "no special factors counselling hesitation in the absence of affirmative action by Congress,"\textsuperscript{104} decided that a damage remedy would properly vindicate Bivens' constitutional right to be free from unreasonable search and seizure. Justice Harlan, believing that "courts of law are capable of making the types of judgment . . . necessary to accord meaningful compensation for invasion of Fourth Amendment rights,"\textsuperscript{105} came to the same conclusion.

Two policy objections were advanced against the Bivens result in the dissenting opinions.\textsuperscript{106} First, Justice Black presented the view that a negative inference was to be drawn from the enactment of section 1983.\textsuperscript{107} In the absence of a similar statute allowing damage suits against federal officials in the federal courts, Justice Black stated that "[a] strong inference can be drawn . . . that Congress does not desire to permit such suits against federal officials."\textsuperscript{108} Yet in making this argument, equating congressional silence with congressional disapproval, Justice Black ignored the particular circum-

\textsuperscript{103} The Sixth Amendment area, the Court has effectuated the right to counsel by holding that counsel must be provided for those criminal defendants unable to afford it. Johnson v. Zerbst, 304 U.S. 458 (1938). This right was made applicable to the states under the due process clause of the fourteenth amendment in Gideon v. Wainwright, 327 U.S. 335 (1963).

\textsuperscript{104} In another context, the Court has inferred a negative implication from the commerce clause of the Constitution, U.S. Const. art. I, § 8, cl. 3, by prohibiting state regulation of commerce where there is federal power to do so. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

\textsuperscript{105} [T]he courts . . . are charged at all times with the support of the constitution and . . . people of all conditions have a right to appeal for a maintenance of fundamental rights." Weeks v. United States, 232 U.S. 383, 392 (1914); see J. Choper, Judicial Review and the National Political Process (1980) (protection of individual rights not only important Supreme Court function but also most clearly supportable exercise of judicial review).

\textsuperscript{106} 403 U.S. at 396.

\textsuperscript{107} Id. at 309 (Harlan, J., concurring in the judgment).

\textsuperscript{108} Id. at 427-28 (Black, J., dissenting).

\textsuperscript{108} Id. at 429 (Black, J., dissenting).
stances surrounding the enactment of section 1983. Section one of the Civil Rights Act of 1871, presently section 1983, was enacted during an era in which the federal government was forced to provide a remedy for the repeated violation of constitutional rights by state governments. Representative Bingham, author of section one of the fourteenth amendment and a vigorous supporter of the Act, asked, "Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of rights as these in States and by States . . . ?" To impute an hostility to damage actions against federal officials from congressional silence in 1871 is to search far for a legislative opinion on the subject. Moreover, it is at least as well argued that a congressional concern for the protection of individual rights is equally applicable to federal or state officials. This would be particularly true given the manifold increase in the power of the federal government since 1871. Thus, while section 1983 certainly does not provide for an action against federal officials, the policies underlying its enactment exhibit no hostility to such an action.

A second policy objection advanced by the *Bivens* dissenters was a fear that the threat of liability for honest errors of judgment would inhibit federal officials not only from committing improper acts but also from committing praiseworthy acts. Necessarily linked with this idea is the concern that those seeking careers in federal service will be dissuaded by the threat of liability in damage actions. That concern, however, need not defeat the action entirely. The creation of a good faith defense, first extended to federal officials by the Second Circuit in the *Bivens* remand, protects those who make bona-fide errors of judgment, or who act when the state of the law is unclear, and thus answers the fears of Justices Black and Blackmun.

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111. CONG. GLOBE, 42d Cong., 1st Sess. app. at 85 (1871).

112. Cf. Butz v. Economou, 438 U.S. 478, 504 (1978): "To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."

113. 403 U.S. at 430 (Blackmun, J., dissenting); id. at 429 (Black, J., dissenting).

114. 456 F.2d 1339 (2d Cir. 1972). The defense was first given the Court's approval, as to *Bivens* actions, in Butz v. Economou, 438 U.S. 478 (1978).

Justice Black's *Bivens* dissent, which is primarily concerned with his distaste for judicial legislation, shows how far his position had changed in the twenty-five years since he wrote the Court's opinion in *Bell*. Limitations inherent in the operation of the federal court system and in the role of the judiciary—limitations that gained new-found recognition following a period of judicial activism—permeate his *Bivens* opinion. Justice Black referred to the increasing number of cases on the dockets of the federal courts and to time spent in conscientious efforts to cope with the heavier workload. The Justice was also concerned with difficulties implicit in a decision to embark on a new course of constitutional law, requiring the resolution of "competing policies, goals, and priorities in the use of resources." Indeed, he doubted that the Court had constitutional power to perform what he regarded as a balancing test.

Yet rather than usurping Congress' role, the Court merely filled a gap in the remedial scheme for vindicating constitutional rights. The key question in *Bivens* was whether the Court's action was consistent with its intended role in the institutional protection of such rights. Once it is accepted that the framers intended the judiciary to enforce and vindicate constitutional rights against violation by other branches of government, the question was precisely whether a damage remedy was necessary if the Court was to fulfill its function. Both the majority and concurring opinions believed it was. The dissenting Justices believed that the creation of a remedy was within the exclusive power of Congress. The legislature, however, did not create the right asserted by Webster Bivens; neither is it authorized to limit the substance of such rights. To the extent that a remedy is necessary to give meaning to a constitutional right, the judiciary is responsible for granting the relief called for. Thus, the Second Circuit's decision, expressing the belief that the damage remedy was only unnecessary—and not

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117. 403 U.S. at 428 (Black, J., dissenting). This concern was echoed in Justice Blackmun's dissent. He predicted that the creation of a damage action "opens the door for another avalanche of new federal cases." Id. at 430 (Blackmun, J., dissenting). But see id. at 391 n.4 (Court criticizes this point); id. at 410-11 (Harlan, J., concurring).
118. Id. at 429 (Black, J., dissenting).
119. Id. at 428 (Black, J., dissenting).
120. See id. at 397; id. at 402-03 (Harlan, J., concurring in the judgment).
121. Id. at 430 (Blackmun, J., dissenting); id. at 427-30 (Black, J., dissenting); id. at 411-12, 418, 422-24 (Burger, C.J., dissenting).
prohibited—struck the appropriate theme. The Supreme Court dissenters, in questioning the judiciary's power without examining the distinct historical importance of constitutional rights and the judiciary's role in protecting them, treated constitutional analysis as statutory analysis.

3. The Policy Goals.—The twin goals of Bivens—compensation and deterrence—become clear when the decision is viewed as a whole. As a threshold matter, plaintiffs are now guaranteed a federal forum for compensatory claims against federal officials who violate their constitutional rights. The majority devoted most of its opinion to refuting the government's claim that state law was controlling, stating that "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." Implicit in the Court's holding was a recognition that uniform rules of law controlling both the plaintiff's constitutional claims and the scope and substance of defendants' claims to official immunity were desirable. Perhaps in light of its experience with the troublesome development of the section 1983 cause of action, the Court was unwilling to leave the development of the Bivens cause of action to the state courts. Moreover, the Court recognized that state and federal law protected differing, and sometimes inconsistent, interests. Justice Harlan, in concurrence, thought it "entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability."

Access to the federal system cannot be an end in itself, as Bell demonstrated, but is instead the means employed to the end of obtaining compensation for an injury to a constitutional right. The majority opinion, in fact, was primarily concerned with the compensation value. The damage remedy also advances the deter-

123. 403 U.S. at 390-95.
124. Id. at 392.
125. Id. at 393-94; see id. at 409 (Harlan, J., concurring in the judgment).
126. Id. at 394-95.
127. Id. at 409 (Harlan, J., concurring in the judgment) (citations omitted).
128. But see Lehmann, supra note 33, at 533-55 (access is Bivens' primary goal).
129. See Note, supra note 33 (compensation is Bivens' primary goal).
rence of wrongful conduct.\textsuperscript{130} Chief Justice Burger, in dissent, contended that the holding in \textit{Bivens} "seeks to fill one of the gaps of the suppression doctrine,"\textsuperscript{131} which in his view rested logically, though ineffectively, on a deterrence rationale.\textsuperscript{132} The government had also relied on deterrence as a necessary element of the remedy, arguing against implication of a damage remedy because it believed that the suppression doctrine, already law, had a better deterrence effect than would a damage remedy, thus rendering the latter unnecessary.\textsuperscript{133} Justice Harlan cautioned, however, that deterrence is only a subordinate goal to compensation, and that a plaintiff's right to recover damages should not depend on a showing that a monetary award against a federal official would deter future lawless conduct.\textsuperscript{134}

The historical arguments already developed indicate that both the compensation and deterrence goals comport with the preconstitutional experience with fourth amendment values. While the amendment was almost certainly written with the goal of deterring illegal action by the new government, the framers' experience is consistent with the view that compensating injury was an equally valid though logically secondary goal.\textsuperscript{135} Thus, while deterrence is the primary goal of the amendment, compensation is the primary—though not exclusive—goal of the remedy.

C. Expansion of the Cause of Action in the Supreme Court

1. The Butz Dictum.—No case based on a \textit{Bivens} theory reached the Supreme Court until 1978, although several Justices mentioned \textit{Bivens} in dicta in the seven years following the decision.\textsuperscript{136} In 1978 the Court decided \textit{Butz v. Economou},\textsuperscript{137} an action
against the Department of Agriculture for conducting a malicious prosecution, after the plaintiff allegedly criticized the department's policies. Two of the plaintiff's causes of action, involving first and fifth amendment claims, were based on *Bivens* theories. The Court granted certiorari solely to consider the issue of official immunity to suit, expressly left open in *Bivens*. However, the majority seized the opportunity to reaffirm *Bivens*, characterizing it as "establish[ing] that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the federal courts to obtain an award of monetary damages against the responsible federal official." This restatement is considerably broader in scope than the original decision, which was limited to fourth amendment claims. Given the reluctance or refusal of some of the lower federal courts to extend *Bivens* logic to claims involving other constitutional rights, the dictum may well have been a cue to suggest a more relaxed interpretation.

2. *Davis v. Passman.*—The Supreme Court addressed the propriety of extending *Bivens* to other constitutional rights in *Davis v.*
Passman. Davis, a woman discharged from her position on U.S. Representative Passman's staff, brought suit in the District Court for the Western District of Louisiana, seeking restitutionary damages. She alleged a violation of her fifth amendment due process right in that the Congressman fired her solely on the basis of gender. The district court dismissed the suit for failure to state a claim, believing that the law provided Davis no private right of action. The court reached this conclusion by applying standards originally developed in *Cort v. Ash* to determine whether a cause of action could be inferred from a statute that did not so provide on its face. In the alternative, the district court held that no violation of Davis' rights had been set out in the facts stated in her complaint.

On appeal, the Fifth Circuit initially reversed the district court, concluding that a *Bivens* cause of action did arise under the due process clause of the fifth amendment, that if Davis' allegations were proved, her discharge violated her constitutional right, and that, although Passman was entitled to a "qualified immu-

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143. 442 U.S. 228 (1979).
144. Complaint at 1-2.
146. 422 U.S. 65, 78 (1975). In *Cort*, a stockholder sought an injunction and damages against Bethlehem Steel Corp. in a derivative suit, alleging that a corporate contribution to a presidential campaign violated federal law. Complaint at 1-6. The Court refused to imply a private cause of action from the criminal statute allegedly violated by the corporation, enunciating the following criteria to govern implication of a private cause of action from a statute not expressly so providing:

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (emphasis in original) (citations omitted) (quoting Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)). Although the Supreme Court distinguished *Cort* from *Bivens* in the *Cort* opinion itself, id. at 82, many commentators had suggested the application of the *Cort* standards in the *Bivens* context. See, e.g., Dellinger, supra note 33, at 1543-52; Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378, 1380, 1388 n.57 (1978). For a discussion of the propriety of the extension, see pp. 965-968 supra.

148. 544 F.2d 865, 882 (5th Cir. 1977), aff'd in part and vacated in part, 571 F.2d 793, 800 (5th Cir. 1978) (en banc), rev'd, 442 U.S. 228 (1979).
nity” from suit because of his congressional status, his actions were not shielded by the speech or debate clause of the Constitution. Sitting en banc, the court of appeals then reversed the initial decision. It held that “no right of action may be implied from the Due Process Clause of the fifth amendment,” because the damage remedy sought was neither congressionally created nor constitutionally compelled.

The Supreme Court granted certiorari and reversed the en banc decision, citing Bivens and Butz in support. The Court held that it was error to apply the Cort standards to a cause of action implied directly from a constitutional provision because “the question of who may enforce a statutory right is fundamentally different than the question of who may enforce a right that is protected by the Constitution.” Justice Brennan, writing for the majority, reasoned that because statutes are enacted by Congress, it is within congressional discretion to decide who possesses and who can enforce rights inherent in a statutory scheme. The judiciary’s role where individuals claim private rights of action under statutes not expressly providing them is to discern the legislative intent underlying the regulatory scheme. The Constitution, on the other hand, was not enacted by Congress. “One of ‘its important objects’ . . . is the designation of rights. And in ‘its great outlines,’ . . . the judiciary is clearly discernible as the primary means through which these rights may be enforced.” Justice Brennan quoted James Madison’s admonition that the rights incorporated in the Bill of Rights were primarily to guard against legisla-

149. Id. at 881; see Wood v. Strickland, 420 U.S. 308 (1975).
150. 544 F.2d at 877-81; see U.S. Const. art. I, § 6, cl. 1. The speech or debate clause was designed to insure the integrity of the legislative process by providing Members of Congress with an immunity from suit for discussion in the congressional chambers. See Doe v. McMillan, 412 U.S. 306, 312-13 (1973).
151. 571 F.2d 793, 801 (5th Cir. 1978) (en banc), rev’d, 442 U.S. 228 (1979).
154. 442 U.S. at 230, 234.
155. Id. at 241 (emphasis in original).
156. Justices Brennan, White, Marshall, Blackmun, and Stevens formed the majority. Id. at 231.
157. Id. at 241.
158. See J.I. Case Co. v. Borak, 377 U.S. 426, 431-33 (1964) (it is duty of courts to provide remedies necessary to effectuate congressional purpose).
159. 442 U.S. at 241 (citations omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)).
tive and executive "encroachment."\textsuperscript{160} Moreover, the judiciary—because it is countermajoritarian in nature—is the most appropriate branch to redress the violations feared by Madison: "[T]he invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."\textsuperscript{161} Because the members of the Court are not elected, they are able to protect the rights of individuals without fear of majoritarian electoral backlash. In the limited discussion presented in the majority opinion in \textit{Davis}, the Court went further in establishing a normative institutional justification for its decision to imply a damage remedy than it had in \textit{Bivens}.

Once the Court's authority to exercise discretion in the protection of constitutional rights is acknowledged, it is next necessary to determine standards that will guide future action. The \textit{Davis} majority established a three-step inquiry,\textsuperscript{162} setting a model for other courts considering the expansion of \textit{Bivens}. The first step involved examination of whether a plaintiff asserted a constitutionally protected right;\textsuperscript{163} the second, whether he or she stated a cause of action which asserted that right;\textsuperscript{164} and the third, whether relief in damages was an appropriate remedy to redress the violation alleged.\textsuperscript{165} All three questions were answered in the affirmative in \textit{Davis}.

The first step of the Court's analysis examined the source of Davis' right—the due process clause of the fifth amendment,\textsuperscript{166} which has been interpreted to include an equal protection element.\textsuperscript{167} Davis alleged that although she was an able and willing worker, Congressman Passman had determined that he needed a man in her position instead, and fired her.\textsuperscript{168} The Court concluded that the allegations presented by Mrs. Davis, if true, would consti-

\textsuperscript{160} \textit{Id.} at 241-42 (quoting 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789)

\textsuperscript{161} 5 THE WRITINGS OF JAMES MADISON 269 (G. Hunt ed. 1904).

\textsuperscript{162} 442 U.S. at 234.

\textsuperscript{163} \textit{Id.} at 234-35.

\textsuperscript{164} \textit{Id.} at 236-44.

\textsuperscript{165} \textit{Id.} at 245-48.

\textsuperscript{166} U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

\textsuperscript{167} \textit{See} Hampton v. Mow Sun Wong, 426 U.S. 88, 100-01 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam).

\textsuperscript{168} 442 U.S. at 230 (quoting letter from Rep. Passman to Mrs. Davis).
tute a fifth amendment violation unless the gender classification at issue withstood the appropriate level of constitutional scrutiny.169

Pursuing the second stage of its inquiry, the Court noted that the existence of a cause of action depends on whether the party asserting the constitutional right at issue is "an appropriate party to invoke the general federal-question jurisdiction"170 of the federal courts. The Fifth Circuit (en banc) had answered the question in the negative based on its application of the Cort standards.171 Justice Brennan rejected the framework offered by the court of appeals, without addressing the particulars of the analysis, and held that

the class of litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.172

The Davis standard for constitutional remedies is essentially the first prong of the Cort standard; that is, whether "the plaintiff [is] ‘one of the class for whose especial benefit the statute was enacted’ . . . ."173 The remaining three of the Cort standards, dealing with separation-of-powers and federalism concerns,174 were appropriately (though implicitly) read out of the analysis. Given the federal judiciary’s institutional function in the protection of constitutional

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169. "To withstand scrutiny under the equal protection component of the Fifth Amendment’s Due Process Clause, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."" Id. at 234-35 (quoting Califano v. Webster, 430 U.S. 316-17 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976))). The Court remanded to the Fifth Circuit for consideration of this and other issues. Id. at 235 n.9, 248-49. The result of the "scrutiny" does not, however, effect the existence of a cause of action. See note 175 infra.
170. Id. at 244.
171. The Fifth Circuit (en banc) held that (1) the injury asserted by Davis less clearly implicated fifth amendment concerns in comparison to Bivens’ fourth amendment claims, 571 F.2d at 797; (2) Congress, which had legislated in the area of employment discrimination in the federal government, "avoided creating a cause of action for money damages for one in Davis’ position," id. at 798; (3) "the breadth of the concept of due process indicates that the damage remedy sought will not be judicially manageable," id. at 799; and (4) the creation of a due-process-based Bivens claim created the possibility of "deluging federal courts," id. at 800.
172. 442 U.S. at 242.
174. See id.; pp. 965-968 supra.
rights and the existence of a federal cause of action against a federal official, the latter *Cort* standards had no place in the *Davis* analysis.\(^{175}\)

In the third step of its analysis, the Court stated that damages were appropriate in this case because they were judicially manageable,\(^{176}\) presenting "a focused remedial issue without difficult questions of valuation or causation."\(^{177}\) Since Passman was by this time no longer in Congress, equitable relief in the form of reinstatement was unavailable; damages were Davis' only remedy.

The Court went on to consider potential limitations on the damage remedy. Although the majority concluded that Passman's position as Congressman did give rise to "special concerns counselling hesitation,"\(^{178}\) it believed that the speech or debate clause afforded him all the protection to which his position entitled him; no additional immunity was necessary. However, whether the clause itself shielded him from liability in this case was not decided, as the en banc court of appeals had not considered the question.\(^{179}\) The Court also stated that since Congress had not explicitly declared that those in petitioner's position could not recover damages,\(^{180}\) the judiciary was free to award them. Whether the Court

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175. Two separation-of-powers issues were presented in *Davis*. The first questioned the legitimacy of governmental action given traditional levels of constitutional scrutiny. 442 U.S. at 234-35. The second concerned the speech or debate clause, U.S. CONST. art. I, § 6, cl. 1. 442 U.S. at 234, 239; id. at 251 (Stewart, J., dissenting, joined by Rehnquist, J.). Neither issue, however, concerned the existence of plaintiffs' cause of action. The speech or debate clause, which "shields federal legislators with absolute immunity," id. at 251 (Stewart, J., dissenting, joined by Rehnquist, J.), presents an issue "regardless of the abstract existence of a cause of action ...." Id. (Stewart, J., dissenting, joined by Rehnquist, J.). The constitutional scrutiny issue must be raised and satisfied by the defendant; thus, absent defendants' success in withstanding the appropriate level of scrutiny, the inquiry will proceed past the first two stages of the *Davis* analysis to the remedial concern. See Califano v. Goldfarb, 430 U.S. 199, 217 (1977); cf. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974) (arguments not raised by petitioner-defendant not considered by Court).

176. *Id.* at 245; see *Bivens*, 403 U.S. at 409 (Harlan, J., concurring in the judgment).

177. 442 U.S. at 245 (citation omitted).

178. *Id.* at 246 (citation omitted) (footnote omitted); cf. *Bivens*, 403 U.S. at 396 (discussing areas where Court would hesitate to provide remedy).

179. The speech-or-debate clause issue drew at least one dissenting opinion in *Davis*. Justices Stewart and Rehnquist believed the judgment should have been vacated and the case remanded to the court of appeals for judgment on the speech-or-debate issue. 442 U.S. at 251 (Stewart, J., dissenting, joined by Rehnquist, J.).

could grant Bivens-type damages in the face of congressional legislation to the contrary was not considered by the majority.

Finally, the majority dismissed the court of appeals’ concern that recognizing a damage remedy for fifth amendment due process violations would deluge the courts with new claims. The Court considered the availability of other forms of relief and the substantive requirements of asserting a cause of action to be significant limitations on the potential influx of similar cases. The “most fundamental answer” to the Fifth Circuit’s concern, in the Court’s view, was provided by Justice Harlan in Bivens: “‘[C]urrent limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.”

The Davis decision is important in several respects. First, it implicitly approved the continuing process of expansion of the Bivens cause of action in the lower federal courts. Defendants could not point to a Supreme Court opinion overturning a lower court decision that had refused to apply Bivens logic to another constitutional provision. Second, rejection of the Cort standards emphasized that, while creation of express private rights of action through statutory enactment was in Congress’ hands, thus limiting the role of the judiciary to ascertainment and effectuation of legislative intent, the role of the judiciary in effectuating constitutional guarantees of individual rights was necessarily far more active. Davis reaffirmed the duty of the federal courts to stand ready to assist those whose constitutional rights are violated and whose only recourse, by the very nature of the constitutional system, is the courts. Finally, the Davis opinion signaled that the primary goal of judicial action in constitutional tort cases is compensation. Unlike Bivens, the deterrence values presented in Davis were of limited magnitude. Nonetheless, in order to give meaning to one plaintiff’s rights, regardless of the adequacy of available remedies to society

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(1976), had failed to include those in Davis’ position, who are not in competitive service. Brown v. General Servs. Administration, 425 U.S. 820, 835 (1976), held that § 717 was an exclusive remedy for those in competitive service. By not providing a remedy to those not in competitive service, the Davis court of appeals believed Congress deliberately, rather than accidentally, excluded them. 571 F.2d at 798.

181. 571 F.2d at 800-01.
182. 442 U.S. at 248.
183. Id. (quoting Bivens, 403 U.S. at 411 (Harlan, J., concurring in the judgment)).
at large, the Court acted. The logic of Justice Harlan's concurrence in Bivens was given new life: "Damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result."

3. Carlson v. Green.—The latest substantive development from the Supreme Court in the Bivens line of cases came last Term, in Carlson v. Green. Mrs. Green brought suit in the district court for the Southern District of Indiana. On behalf of her son's estate, she alleged that injuries he had suffered at the hands of federal prison officials, in violation of the eighth amendment prohibition against cruel and unusual punishment, caused his death. The district court believed the allegations made out a cause of action for damages under Bivens, but held that the Indiana survivorship and wrongful death laws limited recovery in this case to less than $10,000. Since under such an interpretation the then-requisite amount was not in controversy, the district court dismissed the suit.

184. See id. at 237-44.
185. Bivens, 403 U.S. at 408 (Harlan, J., concurring in the judgment).
186. 446 U.S. 14 (1980).
188. 581 F.2d at 670-71. The plaintiff had alleged that her son, a prisoner in a federal penitentiary, had been diagnosed a chronic asthmatic. His condition had necessitated hospitalization for eight days, after which he was returned to the penitentiary despite a medical recommendation that he be transferred to a prison in a more favorable climate. His medication was not continued and as he entered the prison hospital he suffered an asthmatic attack. He remained in the prison hospital in serious condition for eight hours. No doctor was on duty and none was called in. No emergency procedure had been established to deal with such situations. One of the defendants, a nurse, left the prisoner to dispense medication elsewhere. He later returned with a respirator which he tried to use on the prisoner, although he knew it was broken. The prisoner then received an injection of a drug contraindicated for asthmatics. Half an hour later he suffered respiratory arrest and was removed to a hospital, where he was pronounced dead on arrival. Id.
189. IND. CODE ANN. 34-1-1-2 (Burns 1973). Because the decedent left no wife, dependent children, or dependent next-of-kin, damages were limited to the reasonable value of hospital, medical, and surgical expenses, and costs and expenses of administration of his estate. Id. As decedent was a federal prisoner at the time of his death, the court determined, to a legal certainty, that costs could not have exceeded $10,000.
190. See 581 F.2d at 671-72.
The Court of Appeals for the Seventh Circuit reversed,\(^\text{191}\) holding that “whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.”\(^\text{192}\) In the court of appeals’ view, application of Indiana law would have subverted *Bivens*’ policy goals of compensation and deterrence. The Supreme Court granted certiorari\(^\text{193}\) and affirmed.\(^\text{194}\) Two issues were presented for decision. The first was a question of exclusivity of remedy: Given the availability of Federal Tort Claims Act (FTCA) relief\(^\text{195}\) for the conduct complained of, could Green also maintain a *Bivens* action? The second was a question of choice of law: Was the circuit court correct in its determination that federal common law, rather than state statutory law, governed the survival of the plaintiff’s *Bivens* claim?\(^\text{196}\)

Justice Brennan, who had written for the Court in *Bivens* and *Davis*, was joined by Justices White, Marshall, Blackmun, and Stevens in the *Green* majority.\(^\text{197}\) The majority first explained that a *Bivens* action may not be maintained if either of two situations exists in a given case:

The first is when defendants demonstrate “special factors counselling hesitation in the absence of affirmative action by Congress.” The second is when defendants show that Congress has provided for an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.\(^\text{198}\)

The Court held that neither alternative applied in *Green*. First, federal prison officials enjoy no special constitutional status that counsels against judicial creation of a damages remedy against them. The majority believed that a qualified immunity would ade-

\(^{191}\) *Id.* at 676.
\(^{192}\) *Id.* at 675.
\(^{193}\) 442 U.S. 940 (1979).
\(^{194}\) 446 U.S. at 18, 25.
\(^{195}\) The Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1976), waives the sovereign immunity of the United States for certain intentional tort claims where federal officials would otherwise be the only defendants.
\(^{196}\) 446 U.S. at 16-17.
\(^{197}\) *Id.* at 15. Justice Powell wrote an opinion concurring in the judgment, joined by Justice Stevens. *Id.* at 25. Chief Justice Burger, *id.* at 30, and Justice Rehnquist, *id.* at 31, filed separate dissents.
\(^{198}\) *Id.* at 18-19 (emphasis in original) (citations omitted) (quoting *Davis* v. *Passman*, 442 U.S. 228, 245 (1979)).
quately protect such officials in the performance of their duties. Second, Congress had not explicitly declared that an eighth amendment cause of action is not available and that the petitioner must sue instead under the FTCA. The Court noted that Congress must state that a particular remedy is meant to replace Bivens, rather than merely parallel it. Indeed, the legislative history of the FTCA indicated that Congress had intended to create a new remedy against the government itself in order to supplement relief available under Bivens, not to replace it. Moreover, since Congress had stated the conditions under which the FTCA is to be regarded as an exclusive remedy, and had not included the type of injury presented in Green, the Court concluded that congressional silence could properly be construed as approval of an election of remedy.

In support of this conclusion, the majority presented four factors indicating that the Bivens-type remedy is a superior form of relief in comparison with the FTCA remedy. First, Bivens serves the dual purposes of compensation and deterrence, while the FTCA’s purpose is merely compensatory. In the Court’s view, a damage remedy against an individual officer is more effective in deterring unconstitutional conduct than a remedy against the United States. Implicit in this view is a determination that the individual, with more limited resources, will be more likely than the government, with its vast resources, to alter patterns of conduct so as to avoid liability. No empirical data was presented by

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199. Id. at 19.  
200. The Senate Report indicated that after the date of enactment of this measure, innocent individuals who are subjected to raids [like that in Bivens] will have a cause of action against the individual Federal agents and the Federal Government. Furthermore, this provision should be viewed as a counterpart to the Bivens case and its progeny [sic], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved). Id. (emphasis in original) (quoting S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973)). For further discussion of the 1974 amendments to the FTCA, see Note, supra note 33, at 670-72.  
202. 446 U.S. at 20.  
203. Id. at 20-23.  
204. Id. at 21.
the Court in support of this determination. Second, the majority observed that punitive damages may be awarded in a *Bivens* suit but are statutorily prohibited by the FTCA. The second factor, like the first, is concerned with the efficacy of the deterrence aspect of a *Bivens* action. The third factor presented was the availability of jury trials, which are barred under the FTCA. Although juries have often been unsympathetic to *Bivens* plaintiffs—favoring official defendants, such as police and prison officials—the majority believed that the plaintiff should have the option of a jury trial. The fourth factor presented was in fact inextricably linked to the Court's holding on the second issue in *Green*—that of choice of law. The *FTCA* allows an action only "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." This congressional decision to defer to state law on the crucial issue of liability is inconsistent with a basic teaching of *Bivens*: that uniform rules of federal law are desirable where remedies are implied directly from the Constitution. If Mrs. Green had pursued her *FTCA* remedy, state tort law would have governed a federal action seeking to vindicate constitutional rights.

On the choice-of-law issue, the *Green* Court held that because *Bivens* actions are a creation of federal law, the question of survivorship of the action should be decided in accordance with federal law. One of the problems to which the Court had responded in *Bivens* was the undesirability of forcing plaintiffs whose federal constitutional rights were violated to depend on the vagaries of state tort law for recovery. The *Bivens* Court determined that uniform rules of liability were necessary to avoid the possibility of a federal official escaping liability in one state, while another official was forced to pay a large damage award in another, though both were accused of the same unconstitutional conduct.

The majority distinguished *Robertson v. Wegmann*, a section 1983 case in which the Court allowed an action to abate in accordance with the law of the reference state. The *Green* Court

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205. *Id.* at 21-22; *see* 28 U.S.C. § 2674 (1976) (prohibiting punitive damages).
207. 446 U.S. at 23.
209. 446 U.S. at 23.
210. 403 U.S. at 394-95; *accord, id.* at 409-10 (Harlan, J., concurring in the judgment).
212. *See* 446 U.S. at 24-25 & n.11.
noted that section 1988,213 which mandates the choice of law in section 1983 cases, determined the Robertson result. Justice Brennan was careful to point out that

[section 1988 does not in terms apply to Bivens actions, and there are cogent reasons not to apply it to such actions even by analogy. Bivens defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work, federal officials have no similar claim to be bound only by the law of the State in which they happen to work . . . .214

Justice Powell, joined by Justice Stewart, concurred in the result, but disagreed with the Court's reasoning. The Justice stated that the majority's framework for considering factors that would defeat a Bivens cause of action contained "dicta that go well beyond the prior holdings of this Court."215 Justice Powell primarily disagreed with the Court's holding that only an explicit statement by Congress that a legislative remedy substituted for the judicial remedy would suffice to limit the Court's discretion. While he agreed that the "Federal Tort Claims Act . . . simply is not an adequate remedy,"216 Justice Powell believed the judiciary should be willing to utilize effective alternative remedies regardless of whether "Congress has . . . clothed them in the prescribed linguistic garb."217

213. 42 U.S.C. § 1988 (1976) provides in part: The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

214. 446 U.S. at 24 n.11 (citation omitted). The Court left open the possibility of applying state law, as a matter of convenience, in different circumstances. Id.

215. Id. at 26 (Powell, J., concurring in the judgment, joined by Stewart, J.).

216. Id. at 28 (Powell, J., concurring in the judgment, joined by Stewart, J.).

217. Id. at 27 (Powell, J., concurring in the judgment, joined by Stewart, J.); see
The concurring Justices also agreed with the Court's result on the choice-of-law issue. They felt, however, that it was unnecessary to create the impression that federal courts should never look to state law in considering Bivens-type actions.\textsuperscript{218} Justice Powell pointed out that only the Term before, in \textit{Butz v. Economou},\textsuperscript{219} the Court had stressed that the immunities available to a federal official in a Bivens action should mirror those available to a state official in a section 1983 context. The concurrence, apparently seeking to avoid the creation of a completely new body of judicially made federal law, and the attendant burdens on the federal docket, would "routinely refer to state law to fill the procedural gaps in national remedial schemes,"\textsuperscript{220} in the absence of state law frustration of the federal right.

Justice Rehnquist, in dissent, offered an historical approach to support the proposition that \textit{Green} "still further highlights the wrong turn this Court took in \textit{Bivens} ...."\textsuperscript{221} Justice Rehnquist first pointed out that article III of the Constitution created a limited federal judicial power.\textsuperscript{222} Indeed, the ability to create lower federal courts and to define their jurisdiction belongs to Congress.\textsuperscript{223} Although the legislature could specifically grant the federal courts the power to award damages for violations of the Constitution by federal officials,\textsuperscript{224} it had not done so. For Justice Rehnquist, this fact was dispositive: Congress must have intended that those in Bivens' situation file suit in state court to vindicate a common law right to remain free of unreasonable search and seizure. Justice Rehnquist supported his position by mentioning that until 1875 no federal question jurisdiction existed in the lower federal courts to hear constitutional claims.\textsuperscript{225} Further justification for this limited view of federal jurisdiction was found by reference to

\footnotesize{\bibitem{217} 403 U.S. at 407 (Harlan, J., concurring in the judgment): "[I]t seems to me that the range of policy considerations we may take into account is at least as broad as the range of a legislature ...."
\bibitem{218} 446 U.S. at 29-30.
\bibitem{219} 438 U.S. 478 (1978).
\bibitem{220} 446 U.S. at 29 (Powell, J., concurring in the judgment, joined by Stewart, J.).
\bibitem{221} \textit{Id.} at 31-32 (Rehnquist, J., dissenting).
\bibitem{222} \textit{Id.} at 37 (Rehnquist, J., dissenting); \textit{see} U.S. CONST. art. III, § 1.
\bibitem{223} U.S. CONST. art. III, § 1.
\bibitem{224} 446 U.S. at 39-40 (Rehnquist, J., dissenting).
\bibitem{225} 446 U.S. at 42 (Rehnquist, J., dissenting); \textit{see} Act of Mar. 3, 1875, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331(a) (1976)); pp. 962-965 \textit{supra}.}
Erie Railroad Co. v. Tompkins,\(^2\) which Justice Rehnquist characterized as recognizing that the federal courts cannot create common law in civil fields, absent statutory authorization.\(^2\)

Justice Rehnquist’s view of the separation of powers and the role of the federal court system is unnecessarily narrow. While article III courts are indeed of limited jurisdiction, the Supreme Court has always possessed jurisdiction over constitutional claims. In 1875, Congress effected a major change in the jurisdiction of the inferior federal courts, allowing them to entertain constitutional claims.\(^2\) Congress, however, did not write the Constitution. Moreover, the Bill of Rights is in large part a restriction on legislative action. Just as Congress cannot constitutionally limit the Court’s power to hear constitutional questions, and cannot limit the substantive content of constitutional provisions, it cannot limit the Supreme Court’s exercise of a preconstitutional function: the enforcement of a remedial scheme effectuating rights intended by the framers to lie in the hands of a party before the Court. Thus, the fact that the lower federal courts did not exercise jurisdiction to the full extent of article III prior to 1875 is of no consequence: As explained in section II of this Project, the late development of the federal court system is attributable to the tensions of federalism, not those of the separation of powers.\(^2\)

The assertion that the Erie decision counsels a contrary result is likewise open to question. A characterization of that case as limiting the ability of the federal courts to create common law in any civil area is overly broad. At issue in Erie was the propriety of Swift v. Tyson,\(^2\) which began a tradition of creating federal common law in diversity cases, under the section 1332 jurisdiction of the federal courts.\(^2\) Erie reinterpreted the Rules of Decision Act\(^2\) to forbid this practice. Not at issue, and unquestioned in that case, was the ability of the courts to create a common law un-

\(^2\)226. 304 U.S. 64 (1938).
\(^2\)227. 446 U.S. at 37-38 (Rehnquist, J., dissenting).
\(^2\)228. Act of Mar. 3, 1875, § 1, 18 Stat. 470 (current version at 28 U.S.C. § 1331(a) (1976)).
\(^2\)229. The discussion is developed at pp. 962-965 supra.
\(^2\)231. 28 U.S.C. § 1332(a) (1976): “The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 . . . and is between—(1) citizens of different states . . . .”
\(^2\)232. 28 U.S.C. § 1652 (1976): “The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”
nder the federal question jurisdiction of section 1331, in the performance of its constitutional responsibility to protect constitutional rights from infringement by any branch of government. The *Erie* decision responded to federal neglect of state law, perhaps a direct result of the growth of the inferior federal courts in the sixty-three years following the expansion of jurisdiction. Justice Rehnquist analogized *Erie*’s statement of the principles of comity and federalism to cases involving comity and the separation of powers. The analogy, however, is flawed: In the area of federal constitutional law no state—and no branch of the federal government—can limit preconstitutional protection afforded by the judiciary in the effectuation of constitutional rights.

As the Court’s latest word on substantive law in the *Bivens* area, *Carlson v. Green* merits careful scrutiny. The decision on the exclusivity-of-remedy issue removed what previously appeared to be a significant limitation on a *Bivens* cause of action—the requirement that a *Bivens* plaintiff have no other basis on which to seek relief in the federal courts. Although the Court never expressly so held, the implication that those who sued on a *Bivens* cause of action had to be otherwise without a remedy might be fairly inferred from both *Bivens* and *Davis*. Justice Harlan’s concurrence in *Bivens* stressed the fact that the implied remedy was to effectuate

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233. The *Erie* holding, that “[t]here is no federal general common law,” *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), has been characterized as a “clarion yet careful pronouncement.” Friendly, *In Praise of *Erie*—and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 405 (1964) (footnote omitted). Judge Friendly posits that the demise of a general federal common law gave rise to a new, specialized common law developed by the federal courts where there is a truly federal concern at issue. *Id.; see, e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (government sought recovery from bank that innocently cashed forged government check; statute of limitations for action was federal question). Justice Rehnquist’s opinion does not discuss *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), which dealt specifically with the issue of the common law powers of the federal courts in light of *Erie*. The Court there held that where necessary or appropriate, the federal courts could create common law to deal with exclusively federal concerns. *Id.* at 307.

Logically, in a federal question jurisdictional context, the twin values of *Erie*—avoidance of inconsistent results within the same geographic location from state to federal court and unconstitutional federal judicial lawmaking exceeding the congressional lawmaking power by dealing with areas that are exclusively the concern of the states—do not apply. The supremacy clause, U.S. CONST. art. VI, § 2, will prevent inconsistent results between state and federal forums, because the federal interpretation of the Constitution and federal law will supersede inconsistent state interpretations. The exclusively federal law created under the federal question jurisdiction will not surpass the grant of lawmaking power under the Constitution.
the fourth amendment’s guarantee of the right to be free from unreasonable search and seizure in the absence of any other effective remedy. The majority in Bivens stressed the inadequacy of the state tort remedy. In Davis, the Court analogized the plaintiff’s situation to Bivens’ plight: In the absence of a damage remedy, she would be without relief for her injuries. However, the Green Court clarified the situation in which the Court would avoid implication of a Bivens remedy: an explicit congressional statement that the legislative remedy was meant to be exclusive and was equally as effective as recovery directly under the Constitution.

The reasoning for the original interpretation that Bivens was a remedy of last resort is apparent: When the courts infer a damage remedy from the Constitution, they must be mindful of the extraordinary nature of their task. Where Congress has acted to provide a remedy, courts will defer to its judgment both because the legislature has at its disposal the means the courts lack to conduct exhaustive inquiry into social needs and because the legislature purports to reflect the popular will in its decision. To act where Congress has spoken would be to ignore principles of comity.

The decision in Green to allow the plaintiff to retain a choice of remedy in the absence of explicit congressional declaration to the contrary is not without policy justifications. It was the only choice that would further Bivens’ policy goals of compensation and deterrence. The alternative would have been to leave plaintiffs with a remedy that would be less than completely effective for vindicating their constitutional rights.

Equally important was the Green Court’s holding on the choice-of-law issue. Its impact is potentially great, since it represents a definite break with the prior practice of the lower federal courts. When confronted with substantive gaps in Bivens law, the lower federal courts had often looked to section 1983 case law as appropriate precedent to fill them, regardless of the potentially

234. 403 U.S. at 410 (Harlan, J., concurring in the judgment).
235. Id. at 391-92.
236. 442 U.S. at 248.
237. 446 U.S. at 18-19.
238. See L. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 1-7, 3-6 (1978).
239. See text accompanying notes 123-135 supra.
240. See, e.g., Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977) (statute of limitations), cert. denied, 438 U.S. 907 (1978); Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) (good faith defense); Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) (good faith defense).
disparate results that could be created. Section 1983 and Bivens actions are often perceived to be parallel causes of action which share common purposes. Yet they differ in one crucial respect: Congress has instructed the federal courts that in trying section 1983 cases, they are to fill the interstices of federal law with appropriate state law. This may reflect, in part, a judgment that the states have an interest in applying their own law to their officials. In large measure, however, it is likely that section 1983 reflects an accommodation of interests in the Reconstruction Congress that was responsible for its passage. One of the purposes of the statute was to combat the denial of equal protection in the South by the very entities whose duty it was to uphold it—state governments and their officials. Although the laws of the states themselves were usually not inherently unfair, their disparate application to different classes of citizens within state borders presented a classic example of an equal protection violation. Once a federal forum was provided, the small minority of laws that were discriminatory on their face could be disregarded and remaining state law would be vigorously applied without discriminatory effect. There, was, therefore, no need for the development of a new body of federal common law to combat discrimination in section 1983 cases.

Although deference to state law is thus entirely viable in a section 1983 context, problems would arise if the same principle were to be indiscriminately applied in Bivens actions. The states have little interest in the application of their law to federal officials who happen to violate the Federal Constitution. The states’ stronger interest, that of assuring their citizens’ rights, is properly vindicated by applying federal common law to Bivens claims.

241. *See, e.g.*, 446 U.S. at 24-25; *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975).
243. *See* 446 U.S. at 24 n.11.
244. Monroe v. Pape, 365 U.S. 167, 173-74 (1961), summarizes the debates that led to the adoption of § 1983. Three rationale were advanced: (1) to override discriminatory state law; (2) to provide a remedy where state law did not; (3) to provide a federal remedy where a state remedy was adequate in theory, but unavailable as a practical matter to certain classes of people. In the opinion of the Supreme Court, it was not so much the unavailability of state remedies but rather the failure of the states to enforce their laws evenhandedly that furnished the impetus for passage of § 1983. The remedy was created “against those who representing a state in some capacity, were unable or unwilling to enforce a state law.” *Id.* at 175-76 (emphasis in original).
245. For example, the testimony of a black man would not have been accepted against a white man in Kentucky courts at that time. *Cong. Globe*, 42nd Cong., 1st Sess. 345 (1871) (remarks of Sen. Sherman).
Moreover, a real problem arises when one considers the variety of possible results when fifty different bodies of law are applied to determine the liability of federal officials for similar offenses. The vindication of federal constitutional rights might then vary from state to state, a result that would be undesirable. To borrow section 1983 law indiscriminately would thus introduce a note of unpredictability into Bivens actions. As the court of appeals noted in Green, Indiana law allowed abatement, while Illinois law would have provided for survivorship of the Bivens claims. The Supreme Court in Green adopted the federal common law rule to govern survivorship in order to avoid these problems. Although Green counsels uniform standards to determine liability of federal officials for similar violations of constitutional rights, the standard for liability in a Bivens action will not necessarily mirror that of a state action under section 1983, although the state official may be charged with similar constitutional violations. Even at this price, Green teaches that uniformity of result is the value to be furthered in resolving questions of choice of law in the Bivens context.

D. Expansion of the Cause of Action in the Lower Federal Courts

As currently defined by the Supreme Court, nearly a decade after the original Bivens decision, its scope is still remarkably open-ended. Eight years after Bivens, the Court recognized a cause of action for violations of the fifth amendment. One term later, it extended Bivens to allow damage suits based on the eighth amendment right to be free from cruel and unusual punishment. The Court has expressly reserved the question of the propriety of extending Bivens to rights guaranteed by the fourteenth amendment and has yet to address the issue of extending Bivens’ logic to other constitutional provisions. During the same nine-year period, the lower federal courts, in addition to allowing damage actions for violations of the fourth, fifth, and eighth amendments.
ments, have expanded the cause of action to cases presenting first, sixth, and fourteenth amendment violations. This subsection examines the expansion of *Bivens* by the lower federal courts and analyzes the reasoning by which this expansion was accomplished. Because unique policy questions arise in the context of each amendment, the analysis will proceed on an amendment-by-amendment basis.

1. *First Amendment Claims.*—The District Court for the District of Hawaii was one of the first courts to consider extending *Bivens* to an area other than the fourth amendment. In *Butler v. United States*, the plaintiffs were kept off a military base where then-President Nixon was appearing. They sued for violation of their right to peaceably assemble and to petition the government for redress of grievances. The *Butler* court considered and rejected an argument that characterized *Bivens* as merely a recognition of the practical convenience of permitting an original action in federal court when state tort actions would generally be removed to the federal system. The defendants had argued that no *Bivens* action could be brought in the federal courts on a first amendment claim inasmuch as there is no parallel state cause of action removable to the federal system. *Bivens*, however, reflected far more than a desire for judicial economy and clearly established that state law could not govern a federal action based directly on the Constitution.

The court pointed also to the historical interrelation of the first, fourth, and fifth amendments to justify its result: "These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but "conscience and human dignity and freedom of expression as well." " The *Butler* court then noted that each liberty guaran-

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258. Id. at 1037-38.
259. Id. at 1040.
260. 403 U.S. at 390-95.
ted by the first amendment is also secured by the due process clauses of the fifth and fourteenth amendments against encroachment by federal or state governments.\textsuperscript{262} The court concluded that the “irresistible logic of \textit{Bivens} leads to the conclusion that damages are recoverable in a federal action under the Constitution for violations of First Amendment rights.”\textsuperscript{263}

The Court of Appeals for the Third Circuit, in \textit{Paton v. La Prade},\textsuperscript{264} approved the extension of \textit{Bivens} to a damage action for violation of the first amendment rights of freedom of speech and association. The plaintiff, a high-school student, wrote to the Socialist Worker's Party as part of a social studies assignment. In the course of its surveillance of that organization, the Federal Bureau of Investigation began to maintain a file on the student.\textsuperscript{265}

In considering the extension of \textit{Bivens} to a first amendment claim, the court of appeals' only guidance from the Supreme Court was the \textit{Bivens} decision itself. The Third Circuit's earlier decision in \textit{United States ex rel. Moore v. Koezler},\textsuperscript{266} which had allowed a fifth amendment \textit{Bivens} cause of action, was largely without analysis, relying only on the conclusion that \textit{Bivens} was self-extending. Rejecting that reasoning, the \textit{Paton} court noted what it considered to be a possible distinction between the fourth amendment, which had been the basis for \textit{Bivens}, and the first amendment, on which the plaintiff's claim was based. The court noted that the fourth amendment is addressed to the rights of citizens, while the first amendment limits congressional action.\textsuperscript{267} It concluded, however, that the difference in wording was unimportant, inasmuch as what the Constitution prohibits the government from doing is a freedom reserved to its citizens.\textsuperscript{268}

The absence of specific congressional authorization did not limit the court's inquiry. It believed that because a section 1983 action would lie against a state official who violated first amendment rights, a federal official should be similarly liable on a federal cause

\begin{thebibliography}{99}
\bibitem{262} 365 F. Supp. at 1040.
\bibitem{263} \textit{Id.} at 1039.
\bibitem{264} 524 F.2d 862 (3d Cir. 1975).
\bibitem{265} \textit{Id.} at 865.
\bibitem{266} 457 F.2d 892 (3d Cir. 1972).
\bibitem{267} 524 F.2d at 869.
\bibitem{268} \textit{Id.} at 870.
\end{thebibliography}
of action. As the damage to an individual's first amendment right of free speech and free association was the same regardless of who employed the perpetrator, a *Bivens* action was necessary and appropriate to protect the plaintiff's constitutional rights, even in the absence of specific congressional authorization.

The Court of Appeals for the District of Columbia Circuit followed the lead of the Third Circuit in *Dellums v. Powell*, a class action brought by nine persons representing all those arrested on May 5, 1971, for protesting the Vietnam War on the steps of the Capitol. As Representative Abzug addressed the demonstrators, police officers sealed off the area and began arresting them. Plaintiffs alleged a conspiracy by the District of Columbia police and Police Chief Powell to violate their first and fourth amendment rights by arresting and detaining the members of the class without probable cause.

Although it deemed the award of $7,500 per class member excessive, the court upheld the propriety of an award of damages for the violation of first amendment rights. It observed that Justice Harlan's cautionary language in *Bivens* regarding problems of causation and valuation of damages was not a concern in a first amendment context. The court was familiar with causation problems in first amendment cases because it had previously faced the issue in granting equitable relief. It also found that the measurement of damages was no more troublesome than in any other constitutional case where intangible liberty interests were implicated.

The District Court for the Central District of California, in *Writers Guild of America, West, Inc. v. FCC*, similarly extended *Bivens* to first amendment violations. Plaintiffs argued that an FCC regulation, adopted by television broadcasters and the major networks, which restricted programming to a "family hour" format during certain evening hours, was an impermissible form of censorship and thus violative of the writers' free speech rights.

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269. *Id.*

270. *Id.*


272. *Id.* at 173.

273. *Id.*

274. *Id.* at 194-95 (citing *Bivens*, 403 U.S. at 408-09 (Harlan, J., concurring in the judgment)).

275. *Id.*


277. *Id.*
The Writers Guild court first echoed Bivens' assertion that damages are the ordinary remedy for invasions of personal interests in liberty and then noted that the first amendment creates federal personal rights. Defendants' argument that prior cases had allowed damages only where an interference with a plaintiff was direct and almost physical in nature was rejected. Since the distinction had never been suggested by the policy or reasoning of Bivens or its progeny, and did not explain the results in prior cases, such as Paton, the court dismissed the proposed distinction as fanciful and allowed the plaintiffs to proceed.

Since no sound policy reason has been advanced against a first amendment Bivens claim, and because the Supreme Court has recognized Bivens actions for violations of the fourth and fifth amendments, which, as the Butler court noted, are historically linked to the first amendment, little question remains as to the propriety of such first amendment claims. The reasoning of both Davis and Green decided since these lower court cases, gives no reason to question a first amendment Bivens cause of action.

2. Sixth Amendment Claims.—Two courts have considered Bivens claims in a sixth amendment context. While the Eighth Circuit's result in Wounded Knee Legal Defense/Offense Committee v. FBI is highly questionable, the decision of the District Court for the District of Columbia in Berlin Democratic Club v. Rumsfeld is the product of a better-reasoned analysis. In Wounded Knee, the Court of Appeals for the Eighth Circuit allowed attorneys to maintain suit for the violation of their clients' sixth amendment right to counsel. The attorneys did not seek money damages on their clients' behalf but instead prevailed on the court to hear their claim for equitable relief based on a Bivens theory. The court cited Bell and Bivens to support section 1331 jurisdiction over an

278. Id. at 1088-89.
279. Id. at 1089.
280. Id.
283. 365 F. Supp. at 1039 n.8.
284. 442 U.S. 228 (1979).
286. 507 F.2d 1281 (9th Cir. 1974).
288. 507 F.2d at 1284.
289. 327 U.S. 678 (1946).
equitable cause of action, thus avoiding the amount-in-controversy requirement existing at the time. The court correctly noted that Bivens' logic is not limited to the fourth amendment. Yet the analogy to Bivens was unnecessary to support equitable jurisdiction of the federal court on a constitutional claim, as the court's equitable powers, without regard to the amount-in-controversy requirement, had been established long before Bivens. To rest equitable relief on a Bivens theory would seem to suggest that the suit be subject to legal defenses, such as good-faith claims by the defendant-officials. The Eighth Circuit's result thus raised more questions than it set to rest.

The District Court for the District of Columbia, in Berlin Democratic Club, rejected the defendants' contention that Bivens should be limited by its facts to fourth amendment claims and went on to consider whether relief in damages was a necessary or appropriate remedy for an alleged interference with the right to effective assistance of counsel. The court reasoned that a violation of this right could also affect the right to a fair trial and then asserted that even a reversal on appeal could not eradicate some of the injury a plaintiff might suffer, such as loss of reputation, damage to financial resources, and loss of freedom pending appeal. Following Justice Harlan's lead in Bivens, the court concluded that damages were a necessary remedy and that questions of causation and valuation in right-to-counsel cases were "always Thorny, but never insuperable." Thus the court believed that damages were an appropriate remedy.

3. Fourteenth Amendment Claims.—Most of the Bivens case law in the lower federal courts has been generated by claims against municipalities on a fourteenth amendment theory. Yet

291. 507 F.2d at 1284.
292. Section 1331(a) was amended in December 1980 to remove the $10,000 amount-in-controversy requirement. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (to be codified at 28 U.S.C. § 1331(a)). The amendment and the relevant case law are discussed at pp. 1042-1050 infra.
295. Id. at 161-62.
296. Justice Harlan's concurring opinion in Bivens cautioned courts to consider the difficulty involved in questions of causation and valuation, 403 U.S. at 408-09 (Harlan, J., concurring in the judgment), although the primary consideration in his view was whether damages were necessary or appropriate. Id. at 407, 411 (Harlan, J., concurring in the judgment).
297. 410 F. Supp. at 162.
when Bivens is so extended, new concerns arise—those of federalism. In the Bivens decision, no federalism values were implicated since the remedy created was against a federal employee, sued in a federal court, on a federal cause of action. In a fourteenth amendment Bivens claim, plaintiffs seek to hold cities, towns, villages, and other municipal governments liable for constitutional violations. The federal courts, where plaintiffs are successful, will award damages against the treasury of a political subdivision of a state. Though the eleventh amendment may not bar such a result, the special nature of a damage award against a branch of a state government remains a factor to be reckoned with.

In the landmark decision of Monroe v. Pape, the Supreme Court redefined the scope of section 1983 by broadly defining the term “under color of state law” to include unconstitutional acts by state officials even where the state had not explicitly sanctioned the conduct complained of. This decision gave section 1983 a new life in the civil rights battles of the 1960's, rescuing the statute from nearly a century of disuse. In the same case, however, the Court interpreted the legislative history of the statute to exclude municipalities from liability. Plaintiffs who wished to sue municipal governments in the 1970's began to predicate their liability on a fourteenth amendment Bivens theory, invoking jurisdiction under section 1331(a) rather than section 1983 and its jurisdictional counterpart, section 1343, thus avoiding the limitation placed on sec-

298. U.S. CONST. amend. XI provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

299. The eleventh amendment concerns introduced here are discussed more fully at pp. 1089-1090 infra.


301. Id. at 170-87.


304. Section 1343 provides in part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(b) To redress the deprivation, under color of any State law, statutes, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States:
tion 1983 by the Supreme Court. Virtually all the circuits faced the question of the propriety of so extending Bivens, if only in the context of appeals from orders of summary judgment. Most held that plaintiffs had stated claims on which relief could be granted, thus allowing municipal liability under Bivens to bypass the prohibitions established by Monroe.

The First Circuit, in Kostka v. Hogg, stood alone in forbidding such a result. Plaintiffs in the case represented the estate of Kostka, who had been shot and killed by a Westford, Massachusetts police officer in the course of an arrest. The plaintiffs attempted to predicate liability of the town on its failure to train and properly supervise the officer in his duties. Recognizing that it had subject matter jurisdiction, the court stated that Bivens teaches caution in implied-remedy cases. The court refused to allow the plaintiffs to circumvent what it saw in section 1983 as "something

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

305. E.g., Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977) (refusing to allow fourteenth amendment Bivens cause of action against municipality); Gentile v. Wallen, 562 F.2d 193 (2d Cir. 1977) (allowing fourteenth amendment Bivens cause of action against municipality); Brault v. Town of Milton, 527 F.2d 730 (2d Cir. 1975) (panel decision), vacated on other grounds, id. at 736 (en banc); Cagliardi v. Flint, 564 F.2d 112 (3d Cir. 1977) (jurisdiction exists to hear fourteenth amendment Bivens claims against municipalities); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974) (allowing fourteenth amendment Bivens claim against municipality), vacated on other grounds, 421 U.S. 983 (1975); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) (dictum) (approving of Bivens claim against municipality); Roane v. Callisburg Independent School Dist., 511 F.2d 635 (5th Cir. 1975) (allowing fourteenth amendment Bivens claim against school district); Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975) (allowing fourteenth amendment Bivens claim to vindicate fourth amendment rights violated by municipality); Amen v. City of Dearborn, 532 F.2d 554 (6th Cir. 1976) (allowing fourteenth amendment due process claim against a municipality); Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir. 1977), cert. denied, 434 U.S. 822 (1977) (allowing fourteenth amendment Bivens claim against municipality); Hostrop v. Board of Jr. College Dist., 523 F.2d 599 (7th Cir. 1975) (jurisdiction exists for fourteenth amendment Bivens claim against municipality); Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977) (allowing fourteenth amendment Bivens claim against municipality), vacated and remanded in light of Monell v. Department of Social Services, 436 U.S. 658 (1978), 438 U.S. 902 (1978); McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976) (fourteenth amendment Bivens theory alternative ground for jurisdiction). [The cases have been arranged numerically by circuit for convenience of identification.]

306. 560 F.2d 37 (1st Cir. 1977).
307. Id. at 39.
akin to an explicit Congressional determination that political subdivisions are not to be held liable in damages for violation of constitutional rights."

The court then inquired whether the remedy sought was constitutionally compelled, so that it would be forced to act even if inferring a Bivens remedy against municipal governments would be an unwise exercise of judicial discretion on grounds of comity. To infer a damages remedy, in the court’s opinion, would be to decide that the fourteenth amendment embraces a right of those suffering violation of their constitutional rights to full compensation of their injuries. In the absence of a remedy against the individual responsible, such compensation would come from the treasury of the state and/or its political subdivisions. Since the eleventh amendment barred such a result, and since there was no support for the proposition that municipal and sovereign immunity should be subordinated to the Bivens goals of compensation and deterrence, the court affirmed the district court’s dismissal of the complaint.

The Second Circuit reached the opposite result, allowing a plaintiff to proceed against a municipality on a Bivens theory in Gentile v. Wallen. The court there adopted the reasoning of its earlier (reversed) panel decision in Brault v. Town of Milton. Plaintiffs in Brault had alleged that their due process right was violated by a town zoning ordinance which restricted the use of their property. In answer to a motion to dismiss for failure to state a claim, the court held that plaintiffs’ “invocation of the Fourteenth Amendment’s Due Process Clause as the source of their claim for relief comes within Bivens’ sweeping approbation of constitutionally based causes of action.” The only factor noted by the panel as counselling hesitation was the defendant’s municipal status. Yet the town would be sheltered from liability to some extent even un-

308. Id. at 43.
309. Id. at 44.
310. 562 F.2d 193 (2d Cir. 1977).
311. The panel discussion in Brault was reversed on the ground that plaintiffs, in failing to allege malice, had not stated a fourteenth amendment claim. 527 F.2d 736 (2d Cir. 1975) (en banc).
312. 527 F.2d 730 (2d Cir. 1975), rev’d, 527 F.2d 736 (2d Cir. 1975) (en banc).
313. Id. at 734.
314. Id. at 734-35. This analysis was criticized as oversimplistic for ignoring the federalism concern inherent in a federal court’s interference with the finances of municipal governments. Note, Municipal Liability in Damages for Violation of Constitutional Rights—Fashioning a Cause of Action Directly from the Constitution—Brault v. Town of Milton, 7 CONN. L. REV. 552 (1975).
der a *Bivens* action, the court noted, because the federal question jurisdiction under which it was brought required more than $10,000 in controversy.\(^{315}\) A section 1983 action, by contrast, would have required no jurisdictional amount in controversy.\(^{316}\)

One factor the *Brault* court failed to consider was the textual argument that the fourteenth amendment, by its very terms, envisions a central role for Congress in the enforcement of its guarantees.\(^{317}\) Previous cases extending *Bivens*, as well as the original decision, were all concerned with provisions of the Bill of Rights and accordingly were never faced with such an explicit determination of Congress' role. While the court may not have considered this to be dispositive, the argument certainly merited discussion in the opinion.\(^{318}\)

The Supreme Court, in *Monell v. Department of Social Services*,\(^{319}\) reversed that part of the *Monroe* decision that barred all section 1983 suits against municipalities, holding that Congress had meant to bar liability only on a "respondeat superior"\(^{320}\) theory:

> A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmaker or by those whose edicts or acts may fairly be said to represent official policy, inflict the injury that the government as an entity is responsible under § 1983.\(^{321}\)

Since the *Monell* decision, plaintiffs have sought to predicate municipal liability on a respondeat superior theory under a fourteenth amendment *Bivens* claim. No court considering the question has allowed this use of *Bivens*.\(^{322}\)

\(^{315}\) Since the *Brault* decision, the protection envisioned by the court was removed by congressional amendment of the federal question provision. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (to be codified at 28 U.S.C. § 1331(a)).


\(^{318}\) The merits of the argument that congressional power preempts the judiciary's discretion to create a fourteenth amendment *Bivens* action are discussed at pp. 1089-1090 infra.


\(^{320}\) *Id.* at 691-95. Respondeat superior is generally relied upon to hold an employer liable for the tortious acts of his employees. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 69 (4th ed. 1971).

\(^{321}\) 436 U.S. at 694.

\(^{322}\) *E.g.*, Cale v. City of Covington, 586 F.2d 1311 (4th Cir. 1978); Molina v. Richardson, 578 F.2d 846 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978). For a
E. The Mental-State Requirement in Bivens Actions—A Model

One major issue still undecided by the federal courts is the \textit{scienter} requirement in \textit{Bivens} claims. Supreme Court opinions offer no guidance on the question.\footnote{323} Since \textit{Butz},\footnote{324} questions of good faith defenses have been determined by reference to section 1983 precedent, and in conformity with section 1988,\footnote{325} section 1983 provides a convenient starting point for developing a mental-state requirement for \textit{Bivens} actions.

The first line of inquiry with respect to section 1983 is the statutory language, which is not particularly helpful in this context: “Every person who . . . subjects, or causes to be subjected . . . .”\footnote{326} It indicates only a causation requirement and has even been found amenable to a construction permitting liability without fault.\footnote{327} In the \textit{Bivens} context, the statutory language of section 1983 could not be dispositive in any event, as \textit{Bivens} is a judicially created remedy and should be administered by the courts in light of the policy goals that informed its creation. Yet inasmuch as the two causes of action fulfill similar purposes, a study of the judiciary's development of the mental-state requirement in section 1983 case law is instructive.

The Supreme Court indicated in \textit{Monroe} that section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”\footnote{328}

\textit{discussion of Cale, see Case Comment, 13 SUFFOLK U. L. REV. 1150 (1979) (arguing for congressional amendment of § 1983 to reach municipality on respondeat superior theory).}

\textit{323. Neither Bivens, 403 U.S. 388 (1971); Butz, 438 U.S. 478 (1978); Davis, 442 U.S. 228 (1979); nor Green, 446 U.S. 14 (1980), addressed this issue.}

\textit{324. 438 U.S. 478 (1978). The Court of Appeals for the Second Circuit had taken a position on the good faith defense in the \textit{Bivens} remand similar to that later taken by the Supreme Court in \textit{Butz}. See Bivens, 456 F.2d 1339 (2d Cir. 1972).}

\textit{325. The text of § 1988 is reprinted in part in note 213 supra. For discussion of the propriety of extending the § 1983/§ 1988 analogy to \textit{Bivens} case law, see text accompanying notes 240-247 supra.}


\textit{328. 365 U.S. at 187.}
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*Bivens* would seem to be susceptible to the same construction. By this interpretation, a defendant must have intended to commit or fail to commit an act or have been negligent. The threshold question in a section 1983 action is whether a constitutional right has been violated. Liability is imposed for violation of constitutionally protected rights and not for violations of duties of care arising from common law tort. Neither section 1983 nor *Bivens* was an attempt to give state tort suits a federal forum. The mental-state requirement in both actions is thus intimately connected with the particular constitutional violation charged. Thus, for example, the fact that a plaintiff is a prisoner and the defendant a prison official will not suffice to transform a medical malpractice suit into a violation of the eighth amendment prohibition against cruel and unusual punishment. Similarly, to claim invidious discrimination in violation of the fourteenth amendment, it is not enough to show the discriminatory impact of a defendant’s actions: the defendant must have intended to discriminate in order for plaintiffs to make out a claim. When a specific mental state is necessary to violate a constitutional right, plaintiffs must so allege in order to avoid dismissal for failure to state a claim.

The biggest remaining question concerning intent in a section 1983 context is whether negligence is sufficient to make out a claim under an amendment where no specific *scienter* requirement is apparent. Twice the Supreme Court granted certiorari to determine this issue; both cases were decided on other grounds. The only indication the Court has given of a resolution to the issue is the following dictum in *Baker v. McCollan*:

> [W]e have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations . . . .

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332. *E.g., Brault v. Town of Milton*, 527 F.2d 736 (2d Cir. 1975) (en banc) (by failing to allege malice, plaintiffs had not stated valid fourteenth amendment claim); *Pace v. Fauver*, 479 F. Supp. 456 (D. N.J. 1979) (to state proper eight amendment claim plaintiff must show deliberate indifference to particular medical needs).
334. 443 U.S. at 139-40.
Thus the mental-state requirement in a section 1983 context is far from completely settled. In light of this fact, courts facing the scienter requirement in Bivens actions should look to the constitutional provision on which the Bivens suit is based. When a particular amendment can be violated without entertaining any culpable mental state, as in a fourth amendment case where the applicable constitutional provision is prohibitory in nature, then the plaintiff’s prima facie case may be made out without regard to a defendant’s fault; it should be sufficient to allege the violation. Where a mental state is necessary to violate a constitutional provision, as with claims of invidious discrimination under the fourteenth amendment, then once that mental state has been alleged, and the violation shown, plaintiff’s prima facie case has been made out. In either situation, the individual defendant may still plead and show good faith as an affirmative defense. The seriousness of the violation and the culpable mental state entertained by the defendant will also be a part of the calculation of punitive damages.335

F. The Future of the Action

With violations of the first, fourth, fifth, sixth, eighth, and fourteenth amendments already proper bases for Bivens claims, its scope appears to be limited only by the substance of the Constitution itself. At least two courts have indicated that it may extend to all constitutional provisions, thus paralleling section 1983 in scope.336 The Supreme Court has recognized certain limitations on Bivens actions. They may not be maintained in the face of “special factors counselling hesitation in the absence of affirmative action by Congress.”337 Examples given by the Bivens court of such situations include cases where questions of federal fiscal policy are implicated, raising questions of comity for decisions of coordinate branches of government,338 or cases where plaintiffs seek to impose liability on a congressional employee for actions taken in excess of delegated authority, but not in contravention of any specific constitutional provision.339 Special status afforded a defendant by the

335. For a discussion of issues related to punitive damages, see p. 1107 n.96 infra.
337. Carlson v. Green, 446 U.S. at 18; Davis v. Passman, 442 U.S. at 245; Bivens, 403 U.S. at 398.
338. 403 U.S. at 396 (citing United States v. Standard Oil Co., 332 U.S. 301, 311 (1947)).
339. 403 U.S. at 396-97 (citing Wheeldin v. Wheeler, 373 U.S. 647 (1963)).
Constitution need also be considered. In *Green*, the Court found that federal prison officials enjoyed no special status under the Constitution suggesting that judicial creation of a damage remedy against them might be inappropriate.\(^3\) In *Davis*, where defendant's status as a Congressman is the clearest example yet presented of a factor counselling hesitation for reasons of comity, the Court only briefly hesitated to imply the *Bivens* remedy. Instead, Representative Passman was given a qualified immunity, coextensive with the protection afforded him by the speech or debate clause of the Constitution.\(^4\) In light of holdings that legislators and high executive officials such as the Director of the Federal Bureau of Prisons are amenable to suit, it is apparent that few individuals can claim such special constitutional status suggesting the judiciary hesitate to allow actions against them on a *Bivens* theory.

The second limitation on the *Bivens* cause of action is presented where Congress has explicitly declared that a person in the plaintiff's position may not recover damages directly under the Constitution but must instead utilize an alternative remedy equally effective in the view of Congress.\(^5\) Although several of the lower federal courts believed that section 1983 implicitly embodied such a determination, at least with respect to municipal liability for constitutional violations,\(^6\) the particular limits of section 1983 caused many courts to allow *Bivens* claims against municipalities.\(^7\) Since the *Monell* Court overturned this limitation on the 1983 remedy, however, municipal liability under *Bivens* has mirrored that of section 1983.\(^8\)

Justice Harlan's *Bivens* concurrence added the considerations of causation and valuation of damages to the Court's opinion.\(^9\) While these factors have been analyzed in the context of each *Bivens* extension, the federal courts have yet to find these questions so insuperable that they have defeated the implication of a *Bivens* cause of action. Indeed, it is questionable whether the *Bivens* policy goals of compensation and deterrence should be de-

\(^{3}\) Carlson v. Green, 446 U.S. at 19.
\(^{4}\) Davis v. Passman, 442 U.S. at 246.
\(^{5}\) Id. at 246-47; see *Bivens*, 403 U.S. at 397.
\(^{7}\) E.g., Gentile v. Wallen, 562 F.2d 193 (2d Cir. 1977).
\(^{8}\) E.g., Cale v. City of Covington, 586 F.2d 1311 (4th Cir. 1978); Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978), cert. denied, 439 U.S. 1048 (1977).
\(^{9}\) 403 U.S. at 408-09 & n.9 (Harlan, J., concurring in the judgment).
feated by such considerations as causation and valuation of damages, especially since these questions are frequently left to the jury.

In spite of these limitations, the reach of Bivens remains impressively wide. The tripartite analysis created by the Davis Court to guide Bivens’ expansion is not limited on its face by reference to particular amendments.\(^{347}\) Certainly, no fine lines within the Bill of Rights meaningfully separate those provisions already sued on from those which have yet to be recognized as proper Bivens actions. Furthermore, the constitutional embodiment of these rights and their historical interrelation caution against the creation of such lines. Because some provisions will more frequently be the basis of Bivens claims than others, it is worth recalling Justice Harlan’s admonition of ten years ago: “Of course, for a variety of reasons, the remedy may not often be sought. . . . Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation’s government stand ready to afford a remedy in these circumstances.”\(^{348}\)

**IV. PROCEDURAL CONCERNS**

In 1971 the Supreme Court endorsed the creation of a federal cause of action against federal officials in their individual capacities for violations of the constitutional rights of private citizens.\(^1\) In the subsequent decade, however, it has become increasingly apparent that a Bivens plaintiff is faced with numerous, and perhaps crippling, procedural obstacles.\(^2\) In particular, plaintiffs have often had trouble locating a court where venue is both proper and convenient, serving process on defendants who cannot be found within the forum state, establishing subject matter jurisdiction in the district courts, and determining which statute of limitations the court will apply to their claim. Briefly stated, these problems have stemmed from the following four issues.

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\(^{347}\) Davis v. Passman, 442 U.S. at 347.

\(^{348}\) Bivens, 403 U.S. at 411 (Harlan, J., concurring in the judgment).


\(^2\) Many of these obstacles stem from the fact that the Bivens cause of action is judicially created and neither the Supreme Court nor the legislature has ever set forth thorough procedural guidelines for instituting such a claim. Thus, plaintiffs and the courts have been forced to create an avenue for bringing these claims based on existing procedural statutes.
The first issue involves venue considerations. Recently, in *Stafford v. Briggs*, the Court barred any future use by *Bivens* plaintiffs of 28 U.S.C. § 1391(e). Assuming there is no real property involved in the action, section 1391(e) allows claims to be brought in the district where the plaintiff resides thereby avoiding any costly or inconvenient travel. However, in *Stafford*, the Supreme Court held that section 1391(e) is not applicable to damage actions. As such, venue for a *Bivens* action is now controlled by 28 U.S.C. § 1391(b), which allows an action to be brought only in the district where all the defendants reside or in the district where the cause of action arose. Thus the Supreme Court’s narrow interpretation of section 1391(e) has deprived *Bivens* plaintiffs of the benefit of bringing their actions in the local district unless the cause of action arose there.

Second, considering that the defendants in a *Bivens* action will often reside outside the forum state, and that nationwide service of process under section 1391(e) is no longer available to plaintiffs after *Stafford*, a realistic alternative for service of process must be found. Service of process from federal courts is governed by rule 4 of the Federal Rules of Civil Procedure. Process on a *Bivens* de-

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   A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.
   The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.
5. 444 U.S. at 535-36, 543-45.
6. 28 U.S.C. § 1391(b) (1976): “A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.”
7. 444 U.S. at 535-36, 543-44.
fendant must be served in compliance with rule 4(d)(1),\(^9\) which provides that service must be made upon the defendant personally or by leaving it at the defendant's home with a person of reasonable age and discretion. Subsections 4(e)\(^10\) and (f)\(^11\) add that service under rule 4 is confined to the territorial limits of the state in which the district court is located unless otherwise authorized by a statute of the United States, by an order of a United States court, or by a statute of the state in which the district court is sitting. Thus, absent resort to section 1391(e), the plaintiff is required to serve the defendant within the forum state, as section 1391(b) has no provision authorizing out-of-state service. The plaintiff does have the alternative of resorting to the forum state's long-arm statute,\(^12\) and the concomitant provision for out-of-state service of

\(^9\) Rule 4(d)(1) provides that "service shall be made"

(1) Upon an individual other than an infant or incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

\(^10\) Rule 4(e) provides in part that

[w]henever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

\(^11\) FED. R. CIV. P. 4(e).

\(^12\) The New York long-arm statute is representative of most state provisions:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

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process or authorization of a state official to receive process for the long-arm defendant. However, before a plaintiff can call upon a long-arm statute to justify out-of-state service, the court must be satisfied that the defendant has one of the requisite contacts with the forum state as set forth in the long-arm provision. This problem would be avoided by allowing nationwide service of process from all federal courts, as long as subject matter jurisdiction and venue are proper in that court. Such an arrangement would not violate due process, as the minimum-contacts test associated with personal jurisdiction relates only to determining the limits of a state court’s jurisdiction over a nonresident defendant; a federal defendant need only have minimum contacts with the United States to be subject to personal jurisdiction in any federal court.

Third, Bivens plaintiffs will generally need to invoke subject matter jurisdiction under 28 U.S.C. § 1331(a) as no other federal statute will consistently grant the district courts appropriate jurisdiction. Prior to the Federal Question Jurisdictional Amendments Act of 1980, section 1331(a) required a showing of a minimum of $10,000 in controversy in certain cases. As such, plaintiffs had to satisfy the court either that a constitutional deprivation, absent ac-

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.
14. See text accompanying notes 60-66, 82-85 infra.
15. For discussion of why Bivens plaintiffs will generally need to invoke subject matter jurisdiction under § 1331(a) as opposed to other provisions, see text accompanying notes 147-162 infra.
16. Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (to be codified at 28 U.S.C. § 1331(a)): “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”
17. Prior to the 1980 amendment, § 1331(a) read as follows: The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.
tual injury, could be valued at or above the jurisdictional amount, or that the 1976 amendment\textsuperscript{19} to section 1331(a) removed the amount-in-controversy requirement for \textit{Bivens} actions. However, the 1980 amendment eliminated these obstacles to invoking jurisdiction under section 1331(a) by removing the amount-in-controversy requirement in all federal question cases.\textsuperscript{20}

Finally, in deciding which statute of limitations controls in a \textit{Bivens} action, the courts have applied the limitations period covering analogous causes of action pursuant to forum law. However, there has been disagreement\textsuperscript{21} concerning which state action is most closely analogous to a \textit{Bivens} action, leaving the plaintiff uncertain as to which statute of limitations will prevail. This uncertainty unfairly jeopardizes the institution of the action and can seemingly be resolved only through legislative intervention.\textsuperscript{22}

This section shall proceed to examine the history of the issues presented, the resolution of these issues, and the procedural realities presently facing a \textit{Bivens} plaintiff.

\textbf{A. Venue and Service of Process}

1. \textit{Lower Court Decisions Prior to Stafford v. Briggs.}—The most serious procedural problem presently facing \textit{Bivens} plaintiffs is finding a convenient federal forum\textsuperscript{23} and bringing the defendants within its jurisdiction. The recent Supreme Court decision in \textit{Stafford v. Briggs}\textsuperscript{24} barred any future use of section 1391(e) in

\textsuperscript{19} Section 1331(a) was amended in 1976, \textit{id.}, to remove the $10,000 requirement in federal question actions "against the United States, any agency thereof, or any [federal] officer or employee . . . in his or her official capacity."

\textsuperscript{20} For the text of § 1331(a) as amended in 1980, see note 17 \textit{supra}.

\textsuperscript{21} \textit{See} text accompanying notes 193-221 \textit{infra}.

\textsuperscript{22} \textit{See} text accompanying notes 222-230 \textit{infra}.

\textsuperscript{23} Plaintiffs have overwhelmingly avoided the option of bringing a \textit{Bivens} action in state court apparently fearing that state court judges will not have the expertise to adjudicate such a claim, that questions will arise as to the propriety of a state court adjudicating a claim against a federal official, or that state court remedies may be inadequate. \textit{E.g.}, \textit{Bivens}, 403 U.S. at 390-95 (Court considered state law insufficient to fully vindicate fourth amendment rights and potentially inconsistent with fourth amendment policies). Further, one commentator has noted that state courts are not hearing \textit{Bivens} actions: "Whether state courts provide a viable alternative to a federal forum is unknown. A review of the reported decisions of California, Georgia, Illinois, Massachusetts, New York, and Texas yielded no constitutional tort suits against federal officials. Federal courts are more appropriate for \textit{Bivens}-type suits." Note, \textit{supra} note 9, at 682 n.83. The Supreme Court has, however, noted that state courts can, but are not compelled to, hear § 1983 claims. \textit{Martinez v. California}, 444 U.S. 277, 283-84 n.7 (1980).

\textsuperscript{24} 444 U.S. 527 (1980).
holding the statute inapplicable to damage actions.\(^{25}\) Prior to \textit{Stafford}, the most convenient method of satisfying personal jurisdiction, venue, and service-of-process requirements was resort to section 1391(e).\(^{26}\) Section 1391(e) appears to be tailored to the \textit{Bivens} action, which is clearly "[a] civil action in which a defendant is an officer or employee of the United States or agency thereof acting in his official capacity or under color of legal authority."\(^{27}\) Thus the provision would allow the plaintiff to bring his or her claim in any one of three forums, and to serve process for personal jurisdiction on out-of-state defendants through certified mail. However, the courts were not unanimous in this interpretation and application of section 1391(e).

The first major split in the courts centered on whether Congress intended section 1391(e) to apply to personal damage actions or only those actions in the nature of mandamus.\(^{28}\) Section 1391(e) was passed in conjunction with 28 U.S.C. § 1361,\(^{29}\) as the Mandamus and Venue Act of 1962.\(^{30}\) Various courts insisted that the two provisions be read together and as a result held that section 1391(e) was intended only to provide broadened venue and service of process for those actions covered by section 1361—those in the nature of mandamus.\(^{31}\) Other courts were not inclined to read section 1391(e) so narrowly, as the provision does not expressly limit itself to actions in the nature of mandamus. These courts either held or proceeded under the assumption that section 1391(e) was applicable to \textit{Bivens} actions.\(^{32}\)

25. \textit{Id.} at 535-36, 543-44.
26. For the text of § 1391(e), see note 4 supra.
28. The phrase "in the nature of mandamus" includes actions for injunctive relief. Although the Court held in \textit{Stafford} that § 1391(e) does not apply to damage actions, the majority expressly noted that the statute was designed to provide expanded venue and nationwide service of process for actions for declaratory and injunctive relief, as well as for mandamus-type relief. 444 U.S. at 534.
29. 28 U.S.C. § 1361 (1976): "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."
31. \textit{E.g.}, Blackburn v. Goodwin, 608 F.2d 919, 923 (2d Cir. 1979) ("Congress could hardly have intended ... that section 1391(e) apply to cases such as the one at hand. This is a personal damage action against a federal official in his individual capacity."); Kenyatta v. Kelley, 430 F. Supp. 1328, 1330 (E.D. Pa. 1977) ("[Section 1391(e)] does not apply where suit is brought against a federal official in his individual capacity."); Davis v. FDIC, 369 F. Supp. 277, 279 (D. Colo. 1974) ("Since the action at bar is one for damages," § 1391(e) does not apply.).
32. \textit{E.g.}, Lamont v. Haig, 590 F.2d 1124, 1127 (D.C. Cir. 1978) (Section 1391(e)
The second major tension questioned whether section 1391(e) was applicable to both present and former federal officials and employees. Those courts holding that section 1391(e) applied only to present officials, and not to officials who resigned from federal employment after the cause of action arose, generally followed three lines of reasoning. First, if section 1391(e) applies only to actions in the nature of mandamus, then any court order issued to a federal official is meaningless if the official is now a private citizen.\(^3\) Second, section 1391(e) is written in the present tense ("A civil action in which a defendant is an officer or employee of the United States or agency thereof acting in his official capacity or under color of legal authority"), and therefore excludes past actions of former officials.\(^3\) Finally, other courts held that Congress, in drafting section 1391(e), did not intend to subject every individual ever serving as a federal employee to the substantially broadened provision of section 1391(e).\(^3\)

Other courts have held\(^3\) that former officials are included within the scope of section 1391(e), as "an official should not be able to defeat an action against him for illegal acts merely by re-


33. E.g., Kipperman v. McCone, 422 F. Supp. 860, 876 (N.D. Cal. 1976) ("Congress's emphasis upon mandamus actions, which would logically be brought only against an individual currently in office and thus capable of taking the desired action, suggests . . . that Congress did not contemplate that retired officials and employees would fall within the scope of §1391(e).").

34. E.g., id. at 876 ("All verbs in the provision are in the present tense; the statute refers neither to former government official nor to private citizens.").

35. E.g., Lamont v. Haig, 590 F.2d 1124, 1129 (D.C. Cir. 1978) ("One searches Section 1391(e) in vain for even so much as a hint of any congressional desire to widen venue or ameliorate service of process in suits against those whose federal incumbency is a thing of the past."); Kipperman v. McCone, 422 F. Supp. 860, 877 (N.D. Cal. 1976) ("The Court finds it inconceivable that Congress would so substantially broaden the venue provision applicable to every individual once employed by the federal government without comment."); Wu v. Keeney, 384 F. Supp. 1161, 1168 (D.D.C. 1974) (emphasis in original) ("Nothing in the legislative history [of §1391(e)] indicates that Congress intended to include past employees who are being sued for damages in the category of persons subject to extra-territorial service.").

signing his position." Section 1391(e) requires only that the actions complained of were committed "under color of legal authority." The fact that the official has since resigned does not affect his or her status at the time the alleged offense occurred. The actions complained of need only be part of the official's job-related activities and a subsequent resignation cannot logically alter the nature of prior actions. Moreover, when bringing "an action for damages and not for injunctive relief, the fact that the defendants have retired or changed posts is irrelevant."

The final split in the courts concerned due process of law in the context of minimum contacts with the forum state. Section 1391(e) allows for service of process on out-of-state defendants through certified mail. A Bivens plaintiff satisfying the venue requirements of section 1391(e) would therefore not need to contend with the problem of finding the defendant within the boundaries of the forum state. However, in Kipperman v. McCone, the court held that in addition to satisfying the venue requirements of section 1391(e), the plaintiff was also required to satisfy the court that the defendant had sufficient contacts with the forum state to justify subjecting him to suit in that state. The court reasoned that "[w]hile Section 1391(e) makes possible the exercise of jurisdiction over individuals found beyond the territorial limits of the district court by providing a mechanism for effective service of process, its invocation cannot dispel the need to determine whether the exercise of jurisdiction would comport with due process." Yet, the majority of courts have held that there is no need to show that the defendant has minimum contacts with the forum state when invoking personal jurisdiction pursuant to section 1391(e). Rather, "in authorizing service of process by certified mail beyond the

38. Id. at 962: "To assert that because the defendants are no longer in government service the plaintiff may not utilize section 1391(e) . . . would . . . defeat the purposes of the statute."
41. For the text of § 1391(e), see note 4 supra.
42. 422 F. Supp. 860 (N.D. Cal. 1976).
43. Id. at 871.
boundaries of the forum state, Congress intended to provide a source of nationwide in personam jurisdiction in suits where venue is established under section 1391(e)." 45 Such an arrangement does not deny a defendant due process of law, as he need only have minimum contacts with the United States in order to be subject to personal jurisdiction in any district court. 46

2. Stafford v. Briggs: Proceedings Below.—The debate concerning the interpretation and application of section 1391(e) was finally addressed by the Supreme Court in Stafford v. Briggs, 47 which reached the Court on appeal from two circuit court decisions, Briggs v. Goodwin 48 and Driver v. Helms. 49 In Briggs v. Goodwin, the plaintiffs sued three federal attorneys and an agent of the Federal Bureau of Investigation, seeking a declaratory judgment and damages. 50 The cause of action arose in Florida, stemming from alleged false testimony proffered by one of the defendants, the consequences of which were allegedly violative of plaintiffs' constitutional rights. 51 The plaintiffs brought suit in the District of Columbia, personally serving process on one defendant residing in the District of Columbia, and serving the other defendants, who were Florida residents, by certified mail. 52 In reversing the district court, 53 the circuit court held that venue and service of process for the action were controlled by section 1391(e), 54 as the suit was "[a] civil action in which a defendant is an officer or em-

45. Blackmun v. Goodwin, 608 F.2d 919, 925 n.12 (2d Cir. 1979).
46. For further discussion of this concept, see text accompanying notes 62-66, 82-85 infra.
50. 577 F.2d 147 (1st Cir. 1978), rev'd sub nom. Colby v. Driver, 444 U.S. 527 (1980); see 444 U.S. at 527 n.
52. Id. at 2-3.
53. In its unreported order, the district court held that § 1391(e) is inapplicable to damage actions and therefore dismissed the action for lack of venue and in personam jurisdiction. In addition, the court held that out-of-state service of process was insufficient, as the plaintiffs did not allege that the defendants had the requisite minimal contacts with the forum. See Briggs v. Goodwin, No. 74-803 (Mar. 7, 1975), reprinted in 569 F.2d at 3 n.15.
54. 569 F.2d at 7, 10.
ployee of the United States . . . acting in his official capacity." Further, both venue and service of process were held to have been properly satisfied as section 1391(e) allows an action to be brought in any forum where a defendant resides and allows out-of-state defendants to be served process by certified mail.

The circuit court supported its finding that section 1391(e) applies to damage actions by noting that in drafting the provision "both the House and Senate committees rejoined with the observation that the 'venue problem' which the bill [Mandamus and Venue Act of 1962] sought to rectify was as troublesome in damage suits against officials as in other sorts of civil litigation." In view of this language, the court was not persuaded that the consolidated passage of sections 1361 and 1391(e) justified limiting the scope of section 1391(e) to actions in the nature of mandamus. Rather, "[t]he conscious addition by Congress of language designed to extend Section 1391(e) to suits for damages against federal officials acting under color of legal authority, coupled with its adherence to that language despite highly respectable protest, manifests beyond peradventure an intent to broaden venue in just such suits."

The circuit court was equally unpersuaded that service of process upon three of the defendants by certified mail was a denial of due process. The court refuted this contention by noting first that the expansion of venue under section 1391(e) would be of little value unless coupled with a simultaneous expansion of service of process:

That venue exists in a particular district would hardly console a plaintiff unable to serve officials who, though responsible for his plight, had withdrawn beyond the limits of effective service. And

56. 569 F.2d at 3, 10.
57. Id. at 7-8, 10.
59. 569 F.2d at 5 (footnote omitted); see note 77 infra.
60. Id. at 7-8 (citing H.R. REP. No. 536, supra note 58, at 4, reprinted in Petition, supra note 58, at 89a, 94a-95a).
Congress must not have been content to rely simply on state long-arm statutes, for it chose to supplement them in the category of cases encompassed by Section 1391(e) by providing extraterritorial service of its own device.\textsuperscript{61}

Further, as to the defendants' claim that they did not have minimum contacts with the District of Columbia and therefore could not be subjected to its judicial decisions, the court noted that the defendants were misapplying notions of state sovereignty to federal courts.\textsuperscript{62} The defendants incorrectly believed "that Congress' constitutional authority to provide for the sound operation of the federal judicial system is limited by the same constraints that apply to extraterritorial service by state tribunals."\textsuperscript{63} Congress has no constitutional mandate regarding the organization of the inferior federal courts.\textsuperscript{64} Rather, "Congress might have established only one such court, or a mere handful; in that event, nationwide service would have been a practical necessity clearly consonant with the Constitution."\textsuperscript{65} In short, Congress established the federal judicial districts in harmony with state boundaries merely for the sake of convenience and expediency; the creation of these lines did not alter congressional power to broaden the sovereignty of the district courts by providing for nationwide service of process.\textsuperscript{66}

The holdings in Briggs v. Goodwin were echoed by the First Circuit in Driver v. Helms.\textsuperscript{67} In Driver, the plaintiffs brought a class action for damages as well as declaratory and injunctive relief against thirty present or former federal officials in their individual and official capacities for alleged illegal interference with the plaintiffs' mail.\textsuperscript{68} In affirming the district court,\textsuperscript{69} the circuit court ap-

\textsuperscript{61} \textit{Id.} at 8 (footnote omitted) (citing H.R. REP. NO. 536, \textit{supra} note 58, at 4, reprinted in Petition, \textit{supra} note 58, at 89a, 94a-95a). The court also noted that these considerations are equally relevant to all cases brought under § 1391(e), "and indeed any exception would be difficult to justify." \textit{Id.}

\textsuperscript{62} \textit{Id.} at 8-10.

\textsuperscript{63} \textit{Id.} at 8-9 (footnote omitted).

\textsuperscript{64} \textit{Id.} at 9 (citing United States v. Union Pac. R.R., 98 U.S. 569, 602-03 (1878)).

\textsuperscript{65} \textit{Id.} (footnotes omitted). The foundation of this reasoning is that minimum contacts need only be established with the United States, and not any particular state, as the geographical boundaries of a district court could conceivably have been designed to extend to the entire United States. \textit{Id.} at 9 nn.70-71.

\textsuperscript{66} \textit{Id.} at 9.

\textsuperscript{67} 577 F.2d 147 (1st Cir. 1978).


\textsuperscript{69} The district court held that § 1391(e) applies to damage actions against fed-
plied section 1391(e), holding that the statute is applicable to actions for damages against federal officials in their individual or personal capacities. The court noted that although sections 1361 and 1391(e) were passed together as the Mandamus and Venue Act of 1962, the language of section 1391(e) expressly applies the statute to civil actions and does not limit its application to actions in the nature of mandamus. The court also found that the legislative history of section 1391(e) reveals that Congress may have passed the statute with damage actions expressly in mind. Specifically, comment at hearings before the House judiciary committee defined the scope of section 1391(e) as covering an action against "a postal worker slapping a housewife as he delivered the mail," but not covering a "situation in which a postman, after he had gone home for the night, proceeded to run over somebody's child." Thus, while an action based on non-job-related activities would not be covered by section 1391(e), an action to redress unlawful conduct occurring in the course of business was seen as meriting inclusion within the scope of the statute. In addition, the court held that the 1976 amendment to section 1391(e) serves as further proof that the statute applies to damage actions.

70. 577 F.2d at 152 (citing, e.g., Briggs v. Goodwin, 569 F.2d 1; Driver v. Helms, 74 F.R.D. 382).
72. For the text of § 1391(e), see note 4 supra.
73. 557 F.2d at 151.
74. Id. at 152, 154.
75. Hearings on H.R. 10089 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 86th Cong., 2d Sess. (1960) [hereinafter cited as Hearings] (copy on file in office of Hofstra Law Review). The hearings have not been published. For accounts of § 1391(e)'s evolution from H.R. 10089 in 1960 to the revised bill that passed both houses in 1961, see Stafford v. Briggs, 444 U.S. at 536-41; id. at 548-51 (Stewart, J., dissenting, joined by Brennan, J.); Driver v. Helms, 577 F.2d at 152-54; Briggs v. Goodwin, 569 F.2d at 4-5.
76. 557 F.2d at 153 (citing Hearings, supra note 75, at 50, 58 (remarks of Rep. Whitener during statement of Donald B. McGuineas, chief of Gen. Litigation Section, Civil Div., Dep't of Justice)).
77. Id. (quoting Hearings, supra note 75, at 50, 61-62 (remarks of Murray Drabkin, counsel to House Subcomm., during statement of Donald B. MacGuineas)).
78. Id. at 154. Section 1391(e) was amended in 1976, Act of Oct. 21, 1976, Pub. L. No. 94-574, § 3, 90 Stat. 2721 (codified at 28 U.S.C. § 1391(e) (1976)), changing the word "each" to "a" in the first sentence, and adding the following sentence to the end of the first paragraph: "Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such
The amendment, as Chief Judge Coffin found, allows defendants who are not federal officials to be joined in an action against federal officials brought under section 1391(e): "It would make little sense to join someone who is not an officer if the suit were limited to an action in the nature of mandamus. Therefore, the suit Congress was contemplating must be aimed at acts that can give rise to liability for private remedies." 

In affirming the district court, the circuit court in Driver, as had the Briggs court, noted that Congress did indeed expect that providing nationwide service of process by certified mail would correspondingly broaden personal jurisdiction, and "recognized that it would serve no purpose to broaden venue without also broadening service of process." The court held that there need be no showing that the defendants have minimum contacts with the forum state, as that standard relates only to the limits of state court jurisdiction over a nonresident defendant and not a federal court’s jurisdiction over a federal defendant.

The circumscription of state court jurisdiction is a product of boundaries to states’ sovereignty. The United States, however, whose court is here asserting jurisdiction, does not lose its sovereignty when a state’s border is crossed. The Constitution does not require the federal districts to follow state boundaries. That decision was made by Congress, and Congress could change its mind.

Again, the logical extension of this reasoning is that the defendant need only have minimum contacts with the United States, rather than the state where the federal court is located, in order to fall within the jurisdiction of a district court. As to the defendants’ concern that the court’s reading of section 1391(e) would result in subjecting federal officials to the unreasonable burden of defending other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.”

79. 577 F.2d at 154.
80. The district court held that § 1391(e) authorizes nationwide jurisdiction over the defendants in the action. 74 F.R.D. at 389.
81. See text accompanying notes 60-66 supra.
82. 557 F.2d at 156 (emphasis added) (citing H.R. REP. No. 536, supra note 58, at 4, reprinted in Petition, supra note 58, at 89a, 94a-95a; Briggs v. Goodwin, 569 F.2d at 7-8).
83. Id. at 156-57 (citing Briggs v. Goodwin, 569 F.2d at 8-10).
84. Id. at 156 (footnote omitted).
85. Id. at 156 n.25 (citing United States ex rel. Garcia v. McAninch, 435 F. Supp. 240, 244 (E.D.N.Y. 1977)).
themselves in forums throughout the United States, the court noted that such defendants may be protected by 28 U.S.C. § 1404(a), which states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The court in Driver, unlike the Briggs court, addressed the question whether section 1391(e) applies to former federal officials. In reversing the district court, the circuit court held that it does not, as (1) the statute is written in the present tense and therefore excludes past officials or employees; (2) there is no indication in the legislative history that section 1391(e) was designed to include former officials; and (3) it is unrealistic to assume that a government official will resign his position simply to avoid an action against him, particularly since resignation would not terminate his liability. At best, resignation would allow the official to avoid venue in the district where a plaintiff resides, as venue would then be controlled by 28 U.S.C. § 1391(b), which limits the plaintiff's choice to the district where all the defendants reside or where the cause of action arose.

86. Id. at 157.
88. The district court held that § 1391(e) applies to former officials. 74 F.R.D. at 399-400.
89. 557 F.2d at 150-51.
90. Id. at 149-50.
91. Id. at 150. The court found language in the legislative history stating an intention to exclude from the reach of § 1391(e) "at least those former officials who have moved away from Washington." Id. & n.10 (citing H.R. REP. No. 536, supra note 58, at 2, reprinted in Petition, supra note 58, at 89a, 90a).
92. Id. at 150 (citing Driver v. Helms, 74 F.R.D. at 399-400).
93. Id. The court oversimplified this argument on two grounds. First, beyond holding that § 1391(e) does not apply to former federal officials, the court also held that the statute does not apply to federal officials still serving the government, though in a different capacity. Id. at 150-51 & n.11. Thus, while it may be unrealistic to assume that an official will resign his position merely to escape the reach of § 1391(e), it is conceivable that he or she would change departments of service, purposely or otherwise, and thus avoid the broadened venue and service-of-process provisions available to plaintiff under § 1391(e).
Second, the court stated that resignation will only allow an official to avoid venue in the plaintiff's home district. Id. at 150. However, this in turn may enable the defendant to avoid the action altogether, as bringing the suit in the district where all the defendants reside or where the cause of action arose may prove to be too costly and inconvenient for the plaintiff. Further, absent the availability of the provision for out-of-state service of process in § 1391(e), the plaintiff may be unable to bring the defendant within the jurisdiction of the court the plaintiff chooses.
3. The Supreme Court Opinion.—The decisions in Briggs v. Goodwin and Driver v. Helms were jointly reviewed by the Supreme Court in Stafford v. Briggs.94 The Court barred any future use of section 1391(e) by Bivens plaintiffs, holding the statute inapplicable to both damage actions and actions involving former officials.95 The narrow reading of section 1391(e) was not, however, compelled by the statute's legislative history.96

Chief Justice Burger, writing for the Court, noted that sections 1361 and 1391(e) were passed together97 in response to the problems created by existing law,98 which in most cases allowed actions in the nature of mandamus against federal officials to be brought only in the District of Columbia.99 Since section 1361 was created to allow an action in the nature of mandamus to be brought in any district court in the United States,100 the Court concluded that it was intended to provide a similarly expanded choice of venue and means of service of process solely for mandamus-type actions.101 The Court dismissed the fact that the language of section 1391(e) is not limited to actions in the nature of mandamus,102 noting that a statute cannot be literally construed without regard to its legislative intent: “'[I]t is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law . . . .'”103 However, as noted in the dissent, “neither the legislative history nor public policy is inconsistent with the plain meaning of § 1391(e).”104
The Court cited the following language from the House committee report as support for the proposition that section 1391(e) does not apply to personal damage actions:

By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned.\footnote{Yet, the concern set forth in this passage does not affect \textit{Bivens} actions, which are not "suits resulting from the official's private actions." Rather, a \textit{Bivens} suit is brought against a federal official for actions taken while acting in his or her official capacity or under color of legal authority; bringing the suit against the official in his or her individual capacity does not change the fact that the alleged wrongdoings were official, as opposed to private, actions.\footnote{For a discussion of the significance and development of the individual-official distinction, see pp. 960-61 n.87 \textit{supra}.} Further, the Court emphasized the portion of the above passage that defines 1391(e) as covering actions that are essentially against the

\footnote{mention of the plain meaning of § 1391(e) refers to the fact that the language of the mandate expressly applies it to civil actions, and not merely actions in the nature of mandamus. "Thus, by its own terms, § 1391(e) unambiguously extends to the second type of suit against a federal officer, that is, one in which, as here, money damages are sought directly from the federal officer himself." \textit{Id.} at 547 (Stewart, J., dissenting, joined by Brennan, J.); accord, Jacoby, \textit{The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review}, 53 \textit{Geo. L.J.} 19, 32 (1964) ("[Section 1391(e)] has a much wider application than section 1361 in that it is not limited to mandamus actions. Rather, it potentially covers all the different types of suits against federal officers and agencies . . . ").}
United States; *Bivens* actions are essentially against the government, brought against the official in his individual capacity "to circumvent what remains of the doctrine of sovereign immunity," and to serve as a deterrent to abuse of government power. The majority seemed to mistakenly classify a *Bivens* action as purely private.

The Court also relied on testimony, offered in House hearings on section 1391(e), that the language, "under color of legal authority," might erroneously lead to the conclusion that section 1391(e) is intended to cover damage actions against federal officials. However, as noted in the dissent, the fact that the quoted language remained in the statute despite this warning implies that Congress did not find application of section 1391(e) to damage actions either erroneous or unreasonable.

The Court referred to other comments before the House indicating that section 1391(e) may not have been intended to cover personal damage actions, including a remark by the bill's author, Congressman Budge, that "I have no intention of bringing [within this bill] tort actions against individual government employees." However, Justice Stewart noted that even in face of these comments subsequent committee reports expressly referred to personal damage actions when defining the scope of the problem addressed by the Mandamus and Venue Act: "[T]he venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of...

107. 444 U.S. at 537-38 (citing *Hearings*, supra note 75, at 50, 61-62 (exchange between Murray Drabkin, counsel to House Subcomm., and Donald B. MacGuineas, chief of Gen. Litigation Section, Civil Div., Dep't of Justice)).

108. Whatever may have been the intent of the Subcommittee Members who conducted the hearings of the original bill, the Committee Reports accompanying subsequent bills—all of which included the phrase "acting . . . under color of legal authority"—indicated an intent to reach suits against federal officers not only for equitable relief, but also for damages. *Id.* at 551 (Stewart, J., dissenting, joined by Brennan, J.) (ellipsis in original) (citing H.R. Rep. No. 1936, 86th Cong., 2d Sess. 3 (1960); H.R. Rep. No. 536, supra note 58, at 3, reprinted in Petition, supra note 58, at 89a, 94a; S. Rep. No. 1992, supra note 58, at 3, reprinted in [1962] U.S. Code Cong. & Ad. News 2784, 2786).

109. *Id.* at 537-38 (citing *Hearings*, supra note 75, at 50, 62-63 (remarks of Reps. Forrester and Poff during statement of Donald B. MacGuineas); *id.* at 78, 86 (statement of Judge Albert B. Maris, representing the Judicial Conference of the United States); *id.* at 78, 87 (exchange between Rep. Dowdy and Judge Albert B. Maris).

110. *Id.* at 538 (brackets in original) (emphasis omitted) (quoting *Hearings*, supra note 75, at 78, 102 (remarks of Rep. Budge during statement of Judge Albert B. Maris)).
performing his duty.’” Further, Congressman Budge’s exclusion of tort actions from the scope of section 1391(e) does not necessarily bar a *Bivens* claim, as a constitutional deprivation is not necessarily the equivalent of a common law tort.

Finally, the Court contended that it would be unfair to subject a government official to an action for damages in the plaintiff’s home district when a private defendant in the same type of action could be sued only in the district of his residence or in the district where the cause of action arose. However, as the dissent noted, this view fails to consider that both present and former government officials, unlike private citizens, will generally be represented in such an action by the Justice Department. As such, federal offi-


112. See *Bivens*, 403 U.S. at 394: “The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.”

113. 444 U.S. at 544.

114. 28 U.S.C. § 1391(b) (1976). For the text of § 1391(b), see note 6 *supra*. For the text of the 1976 amendment to § 1391(b) allowing private defendants to be joined in the same action, see note 78 *supra*.


Under the procedures set forth [in § 50.51(a)(1)-(8)], a federal employee (herein defined to include former employees) may be represented by Justice Department attorneys in state criminal proceedings and in civil and Congressional proceedings in which he is sued or subpoenaed in his individual capacities, not covered by § 15.1 of this chapter.

The willingness of the Justice Department to exercise its option to defend government officials in *Bivens* actions is evidenced by then-Deputy Attorney General Katzenbach’s instructions to all United States Attorneys shortly after the passage of § 1391(e). The instructions stated in part:

The venue provision [§ 1391(e)] is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. . . . As an example, suits for damages alleged libel or slander by Government officials (which the Department defends on the ground that statements made by a Government official within the scope of his authority are absolutely privileged . . . ) fall within the venue provision of this statute.

444 U.S. at 559 (Stewart, J., dissenting, joined by Brennan, J.) (brackets in original) (ellipses in original) (quoting Memorandum by Nicholas deB. Katzenbach, Deputy Attorney General, for all United States Attorneys 7 (Jan. 18, 1963) (Memo No. 337) (emphasis omitted) (citations omitted) (footnote omitted) (copy on file in office of
cials are relieved of the burdens of obtaining counsel and of per-
sonally defending themselves in a forum away from their home.
This substantially undercuts the Court's concern that construing
section 1391(e) to cover personal damage suits would unfairly single
out and subject federal officials to broader venue and service-of-
process provisions.116

In sum, the majority ignored the plain meaning of section
1391(e) and held that the statute applies only to actions in the na-
ture of mandamus. The key flaw in the Court's opinion is the erro-
neous classification of a Bivens suit as a purely private action. Sec-
tion 1391(e) was passed in order to facilitate actions against the
United States and its officers stemming from their official activities;
a Bivens claim is precisely such an action. Neither the legislative
history of section 1391(e) nor public policy compels the Supreme
Court's narrow interpretation of the statute.

4. Future Effects of Stafford v. Briggs and Suggestions for
Reform.—As a result of the holding in Stafford v. Briggs, section
1391(e) is no longer available for use in damage actions against fed-
eral officials, forcing Bivens plaintiffs to resort to section 1391(b) to
satisfy venue requirements.117 Contrary to the liberal provisions
set forth in section 1391(e), section 1391(b) allows the action to "be
brought only in the judicial district where all defendants reside, or
in which the claim arose."118 The fact that the plaintiff's home dis-
trict is no longer a permissible alternative venue for a Bivens action
will often result in the inconvenience and injustice that section
1391(e) was intended to cure.119

Hostra Law Review, excerpted in Brief for the Respondents app. C, at 16a, 17a,
Stafford v. Briggs, 444 U.S. 527 (1980)). This indicates that the Justice Department
believed that § 1391(e) was intended to cover damage suits against federal officials
for actions taken under color of legal authority. Moreover, "it indicates that the Jus-
tice Department has long assumed a special responsibility for representing federal
officers sued for money damages for actions taken under color of legal authority."
444 U.S. at 552; cf. Jacoby, supra note 104, at 37 (Bivens actions usually defended by
Justice Department).

116. The subjection of federal officials to § 1391(e) is further justified by the
nature of federal service: "[Officers of the federal government are different from pri-
ivate defendants because they can anticipate that their official acts may affect people
every part of the United States." Driver v. Helms, 577 F.2d at 157.

117. A recent district court decision noted that Stafford v. Briggs made it clear
that § 1391(e) does not apply to Bivens actions. Rather, the question of proper venue
is controlled by § 1391(b). Schenker v. United States Parole Comm'n, 85 F.R.D. 696,
697 (D. Colo. 1980); accord, Micklus v. Carlson, 632 F.2d 227, 240 (3d Cir. 1980);


119. See H.R. REP. NO. 536, supra note 58, at 3, reprinted in Petition, supra
Beyond the loss of the plaintiff's home district as a choice of venue there is the further danger that neither alternative venue under section 1391(b) will assure the plaintiff of a reasonably convenient forum. The district where the cause of action arose may be far from the plaintiff's home, while the alternative of bringing suit in the district where all defendants reside may prove to be valueless, as such a district may not exist. Bivens actions are generally filed against numerous federal officials, thereby decreasing the chance that all of the defendants will reside in the same district.

Yet, even if the plaintiff is fortunate enough to reside in, or near, the district where the cause of action arose, he or she is still faced with the obstacle of serving process on nonresident defendants, as section 1391(b), unlike section 1391(e), does not provide for nationwide service of process. Thus, absent contrary federal authority, service is limited to the boundaries of the state in which the district court is located. The only available alternative for

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note 58, at 89a, 92a-93a; S. REP. NO. 1992, supra note 58, at 3, reprinted in [1962] U.S. CODE CONG. & AD. NEWS 2784, 2786:

The Government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U.S. attorneys are present in every judicial district. Requiring the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition.

On the other hand, where a citizen lives thousands of miles from Washington, where the property involved is located outside the District of Columbia, where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government.

120. The federal transfer-of-venue provision, 28 U.S.C. § 1404(a) (1976), will not be of any help to the plaintiff, as that provision only allows for transfers to a district where the action could have initially been brought. For the text of 1404(a), see text accompanying note 87 supra.

121. It seems illogical to restrict the number of available fora as the number of alleged wrongdoers increases. Seidelson, Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions, 37 GEO. WASH. L. REV. 82, 84 (1968). Of course, the plaintiff could avoid losing this choice of forum by bringing an individual action against each defendant in his or her home district. However, this would be very costly and inconvenient for both the plaintiff and the courts. Further, "[p]iecemeal litigation carries with it the possibilities of repetitive, incomplete, and inconsistent adjudication." Hazard, Interstate Venue, 74 NW. U.L. REV. 711, 715 (1979).

122. Service of process will not be a problem if all the defendants reside in, or can be found in, the district where the cause of action arose. However, such good fortune is rare, as the number of cases based upon § 1391(e)'s provision for out-of-state service of process would indicate.

123. FED. R. CIV. P. 4(f). For the text of rule 4(f), see note 11 supra.
serving process on a nonresident defendant becomes resort to the forum state's long-arm statute. For example, state law may provide that personal jurisdiction can be obtained over a long-arm defendant by personal service of process anywhere in the world. However, the plaintiff is then saddled with the burden of satisfying the court that the defendant meets one of the requirements of the long-arm statute, which generally entails a showing of certain minimum contacts with the forum state. The definition of minimum contacts will vary from state to state but will generally center on the notion of doing business in the forum state or having committed a tortious act within the forum state. As such, a Bivens plaintiff will have to question whether a constitutional deprivation is a tortious act or whether, in light of the range and nature of the defendant's activities, the forum state's definition of "doing business" is satisfied. While there will be instances when the mini-

124. FED. R. CIV. P. 4(e). For the text of rule 4(e), see note 10 supra.
125. E.g., N.Y. CIV. PRAC. LAW § 313 (McKinney 1972).
126. For the text of a typical state long-arm statute, that of New York, see note 12 supra.
mum-contacts requirement will clearly be satisfied, the defendant's connection with the forum state will often be too tenuous to satisfy the court that the requisite contacts exist.\textsuperscript{129}

In light of the problems created by the failure of section 1391(b) to provide a means for serving process on nonresident defendants, there is a need for liberalization of federal service-of-process requirements.\textsuperscript{130} The institution of a legitimate federal cause of action, filed in a court where venue is proper, should not and need not be frustrated by the plaintiff's inability to serve process on an out-of-state defendant. Rather, in keeping with due process requirements, Congress could provide for a federal system in which nationwide service of process would be permitted in all cases, as long as subject matter jurisdiction and venue were satisfied.\textsuperscript{131} There need be no concern whether the defendant


\textsuperscript{130} See R. FIELD & B. MISHKIN, ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, TENT. DRAFT NO. 1 (1963); Barrett, Venue and Service of Process in the Federal Courts—Suggestions For Reform, 7 VAND. L. REV. 608 (1954); Ehrenzweig, From State Jurisdiction to Interstate Venue, 50 OR. L. REV. 103 (1971); Hazard, supra note 121; Jacoby, supra note 104; Seidelson, supra note 121; cf. Abraham, Constitutional Limitations Upon the Territorial Reach of Federal Process, 8 VILL. L. REV. 520 (1963) (while agreeing that inability to obtain personal jurisdiction over out-of-state defendants may stand in way of justice, author warned of due process violations that may result from liberalization of federal venue and service-of-process requirements).

\textsuperscript{131} Responding to the problems created by the restrictive nature of federal venue and service-of-process provisions, Professor Wright has noted that "the ultimate solution seems likely to be that of permitting nationwide service of process in all cases, with inconvenience to parties avoided by adjustment of the venue requirements and provision for transfer to the most convenient forum." C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 64, at 305 (3d ed. 1976) (footnote omitted). Professor Barrett has similarly endorsed the notion of allowing nationwide service of process from all federal courts:

Congress might reasonably have . . . treated the continental United States as a single jurisdiction. On this basis service of process would have been permitted throughout the United States, venue rules would have been designed to channel litigation into the most convenient district, and provision would have been made for a motion for change of venue to be granted whenever the suit was commenced in a district which did not have venue. Barrett, supra note 130, at 608. Professor Seidelson agreed, stating that "a United States court hearing a congressionally created cause of action ought to enjoy
would be subject to personal jurisdiction in a particular district, as
he or she need only have minimum contacts with the United States
in order to be subject to personal jurisdiction in every federal court
in the country.\footnote{132} Further, with venue governed by section
1391(b), the defendant will be required to have some contact with
the district chosen by the plaintiff, either by residence or by in-
volve... in the district.\footnote{133} In short, Congress need not maintain blind adherence to a system of
federal process that does not accommodate the judicial needs of so-
icity.\footnote{134} Allowing nationwide service of federal process would facil-

nationwide jurisdiction.” Seidelson, supra note 121, at 82. Regarding analogous
problems caused by unnecessarily narrow state venue and service-of-process provi-
sions, Professor Ehrenzweig believed that “[j]urisdiction must become venue.”
Ehrenzweig, supra note 130, at 113.

\footnote{132} See text accompanying notes 60-66, 82-85 supra; accord, Robertson v. Rail-
road Labor Bd., 268 U.S. 619, 622 (1925) (“Congress has power . . . to provide that
the process of every district court shall run into every part of the United States.”).
The Court did not address, and accordingly did not affect, the lower courts’ holding
that § 1391(e) constitutionally provides all district courts with personal jurisdiction
over any defendant who has minimum contacts with the United States (and other-
wise falls within the purview of the statute). This position finds support in the dis-
senting opinion in \textit{Stafford}:

[D]ue process requires only certain minimum contacts between the defen-
dant and the sovereign that has created the court. The issue is not whether
it is unfair to require a defendant to assume the burden of litigating in an in-
convenient forum, but rather whether the court of a particular sovereign has
power to exercise personal jurisdiction over a named defendant. The cases
before us involve suits against residents of the United States in the courts of
the United States. No due process problem exists.

444 U.S. at 554 (Stewart, J., dissenting, joined by Brennan, J.) (citation omitted); ac-
court to redress federal constitutional rights not limited by state boundaries). Jus-
tice Stewart further noted that if a federal official is faced with a suit in an extremely
inconvenient forum, he or she can request a transfer of venue under 28 U.S.C.
§ 1404(a) (1976): “It is not unreasonable to expect that district courts will look sympa-
thetically upon a motion for a change of venue in any case where a federal officer
could show that he would be substantially prejudiced if the suit were not transferred
to a more convenient forum.” 444 U.S. at 554 (Stewart, J., dissenting, joined by
Brennan, J.).

\footnote{133} Any inconvenience suffered by the defendant as a result of allowing
nationwide service of process would not seem to be any greater than the inconven-
ience presently suffered by the plaintiff. Further, unlike the plaintiff, the defendant
will be able to request a transfer of venue under § 1404(a) if it appears that
the plaintiff has chosen a particular district to deliberately inconvenience the defendant.
Seidelson, supra note 121, at 86-87.

\footnote{134} Barrett, supra note 130, at 612 (federal venue and process “[r]ules devised
in horse and buggy days have been perpetuated in the days of the airplane and the
telephone.”); Hazard, supra note 121, at 713-14 (“if federal court venue and range of
process are inconvenient, congressional legislation can and should be amended to
remedy the situation, as indeed it sometimes has been.”).
ulate the institution of the ever-increasing number of interstate and multistate cases in the federal courts, without infringing on the defendant's right to due process.

Finally, mention must be made of the arbitrary prejudice suffered by a *Bivens* plaintiff as a result of the narrow scope of section 1391(b). An action based on diversity of citizenship may be brought in the district where the claim arose, where all the defendants reside, or where all the plaintiffs reside.\(^{135}\) In contrast, federal actions not based on diversity can be brought only in the district where the claim arose or where all defendants reside.\(^{136}\) As one commentator has observed, "[n]either legislative history nor decisions reveal the reason why the venue was made more restricted in federal question than in diversity cases."\(^{137}\) The unavailability of the plaintiff's home district as an alternative venue will further prejudice a *Bivens* plaintiff if he or she chooses to bring the action in his or her state court. The federal removal provision\(^{138}\) would enable the defendant to remove the case to the corresponding district court, as long as the district court would have had original jurisdiction. Thus, the defendant is afforded the opportunity to bring the case into a court to which the plaintiff was initially denied access.

The decision in *Stafford v. Briggs* has created serious procedural problems for a *Bivens* plaintiff. The Court's ruling that section 1391(e) does not apply to personal damage actions deprives *Bivens* plaintiffs of the option of bringing their claim in their home forum unless the cause of action arose there. More seriously, se-

\(^{135}\) 28 U.S.C. § 1391(a) (1976): "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose."


\(^{137}\) Barrett, *supra* note 130, at 612 n.25. As for invoking jurisdiction in *Bivens* actions under 28 U.S.C. § 1332(a) (1976) (diversity of citizenship), two problems arise: First, considering that *Bivens* actions generally involve numerous defendants, complete diversity—a prerequisite to the invocation of § 1332(a)—often will not exist; second, § 1332(a) requires an amount in excess of $10,000 in controversy, a requirement which has often proved troublesome for *Bivens* plaintiffs. See text accompanying notes 163-180 infra; pp. 1094-1107 infra. Even if jurisdiction could successfully be invoked under § 1332(a), the more serious problem of service of process on out-of-state defendants would still exist.


Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
vice of process on defendants is now limited to the boundaries of the forum state, unless the plaintiff can satisfy the court that the defendant has one of the requisite contacts with the forum state set forth in the state's long-arm statute. This procedural arrangement is unnecessarily restrictive and can constitutionally be improved by allowing for nationwide service of process from any federal court which satisfies federal subject matter jurisdiction and venue requirements.

B. Subject Matter Jurisdiction

Bivens plaintiffs generally need to invoke subject matter jurisdiction in the district courts under 28 U.S.C. § 1331(a),139 the federal question provision. Bivens actions, by definition, satisfy the statute's sole requirement that the action arise under the Constitution, laws, or treaties of the United States.140 However, prior to its 1980 amendment,141 section 1331(a) also required a minimum amount in controversy in excess of $10,000,142 the satisfaction of which often raised serious problems for Bivens plaintiffs. Specifically, many courts dismissed actions for failing to satisfy the $10,000 requirement, holding that a constitutional deprivation, absent actual injury, is incapable of valuation and therefore cannot satisfy an amount-in-controversy requirement.143 While this problem was seemingly resolved when section 1331(a) was amended in 1976 to remove the amount-in-controversy requirement in actions against federal officials in their official capacity,144 the courts were divided on whether this amendment applied to Bivens actions.145 The fact that Bivens actions, clearly federal question claims, were still being dismissed for failure to satisfy the amount-in-controversy requirement emphasized the need for the 1980 amendment. The removal of the $10,000 minimum-amount-in-controversy requirement was a necessary and logical change in federal jurisdiction.

The propriety of the 1980 amendment of section 1331(a) is best evidenced through a review of the problems facing a Bivens
plaintiff, prior to the amendment, when invoking subject matter juris-
diction in the district courts.\textsuperscript{146} An examination of federal jurisdic-
tion statutes reveals that subject matter jurisdiction for a \textit{Bivens} action is best invoked under section 1331(a). Other federal jurisdic-
tion statutes are simply not accommodating. For example, 28 U.S.C. § 1346(a)(2)\textsuperscript{147} states in relevant part that the district courts shall have original jurisdiction over any civil action \textit{against the United States}, not exceeding $10,000 in amount, founded upon the Constitution, and not sounding in tort. Aside from the question whether a \textit{Bivens} action sounds in tort, and the inevitable prob-
lems of sovereign immunity,\textsuperscript{148} a \textit{Bivens} action is not formally against the United States.\textsuperscript{149} This problem similarly bars use of 28 U.S.C. §§ 1346(b), 2671-2680,\textsuperscript{150} as these provisions are also expressly related to the liability of the United States and make no mention of actions brought against federal officials in their individual capacities.

28 U.S.C. § 1343(a)(3) and (a)(4)\textsuperscript{151} also fail to provide subject matter jurisdiction for \textit{Bivens} actions. Section 1343(a)(3) applies only to actions to redress constitutional deprivations committed under color of state authority, while \textit{Bivens} actions are concerned with deprivations committed under color of federal authority. Section 1343(a)(4) applies to actions to recover damages “under any Act of Congress providing for the protection of civil rights”: \textit{Bivens}

\begin{thebibliography}{99}

\bibitem{146} For a discussion of plaintiffs’ option to bring a \textit{Bivens} action in state court, see note 23 \textit{supra}.
\bibitem{148} See pp. 1083-1091 infra.
\bibitem{149} See pp. 970-986 \textit{supra}.
\begin{itemize}
  \item (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
  \begin{itemize}
    \item (3) To redress the deprivation, under color of any State law, statute, or-
dinance, regulation, custom or usage, of any right, privilege or immunity se-
cured by the Constitution of the United States or by any Act of Congress
    providing for equal rights of citizens or of all persons within the jurisdiction
    of the United States;
    \item (4) To recover damages or to secure equitable or other relief under any
      Act of Congress providing for the protection of civil rights, including the
      right to vote.
  \end{itemize}
\end{itemize}
\end{thebibliography}
actions are brought under the Constitution, which does not qualify as an Act of Congress.152

There are numerous other federal statutes granting the district courts jurisdiction over certain classes of cases without regard to a minimum amount in controversy. However, the class of cases covered by each statute is very specific—such as cases in the areas of admiralty,153 bankruptcy,154 some commerce and antitrust regulations,155 patents,156 postal service,157 internal revenue affairs,158 alien suits for tortious violations of a United States treaty,159 Indian rights to land,160 seizures under any law of the United States on land or waters not within admiralty or maritime jurisdiction,161 or federal questions instituted by Indian authorities162—and rarely will cover the subject matter of a Bivens action.

In light of the limitations of other jurisdictional statutes, section 1331(a) becomes the only choice for invoking subject matter jurisdiction in the district courts for Bivens actions.163 This has not, however, always been an easy matter. Prior to 1976, when the amount-in-controversy requirement still applied to all cases brought under section 1331(a),164 there was a sharp split among the

152. In an action alleging an unconstitutional deprivation of the right to trial by jury, the Court of Appeals for the District of Columbia held that subject matter jurisdiction could not be invoked under § 1343(4), as there was no Act of Congress providing for the protection of this right. King v. Morton, 520 F.2d 1140, 1146 (D.C. Cir. 1975). Judge Tamm, dissenting on other grounds, noted that

[although 1343(4) does not contain the “color of any State law” phraseology of 1343(3), neither its brief legislative history . . . nor its subsequent judicial interpretation . . . indicates that it was intended to encompass actions of federal officials. While 1343(4) has been successfully asserted as a basis for jurisdiction over actions of state officials, . . . appellant has not cited, and I have not uncovered, so much as a single case, holding 1343(4) to be a proper jurisdictional basis over actions of federal officials.

Id. at 1150-51 (Tamm, J., dissenting) (citations omitted).

164. The 1976 amendment of § 1331(a) removed the $10,000 requirement for
federal courts as to whether a constitutional deprivation, absent actual injury, was capable of valuation, and thus able to satisfy the $10,000 requirement. Many courts held in the negative, noting that despite the questionable virtue of the $10,000 requirement, it could not be excused on the ground that the alleged damages were incapable of measurement. Thus, despite allegations of serious constitutional deprivations, the actions were dismissed.

In contrast, other opinions exemplified an increasing reluctance to dispose of federal constitutional issues on jurisdictional grounds, arguing that constitutional rights are so fundamental that their "inherent value" must be equal to any amount set for jurisdictional purposes. Moreover, because section 1343(a)(3) of federal question actions against the United States or against a federal official in his official capacity. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721. Prior to that amendment, the amount-in-controversy requirement applied to all cases brought under § 1331(a). In Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), the Supreme Court expressly noted that satisfying the amount-in-controversy requirement was necessary in actions against federal officials for alleged deprivations of constitutional rights. Id. at 547.


166. E.g., Goldsmith v. Sutherland, 426 F.2d 1395, 1397 (6th Cir.) (citation omitted), cert. denied, 400 U.S. 960 (1970) ("there is no exception to the $10,000 requirement simply because the alleged damages under the asserted claim may be incapable of a monetary valuation. . . . [J]urisdiction under Section 1331 cannot be founded on a right secured by the Constitution unless it is capable of money valuation."); Giancana v. Johnson, 335 F.2d 366, 368 (7th Cir. 1964), cert. denied, 379 U.S. 1001 (1965) ("Courts may not treat as a mere technicality the jurisdictional amount essential to the 'federal question' jurisdiction, even in this case where there is allegedly unwarranted invasion of plaintiff's privacy."); Post v. Payton, 323 F. Supp. 799, 804 (E.D.N.Y. 1971) ("However unwise the $10,000 requirement may seem to be in establishing federal question jurisdiction, it nevertheless remains in the statute and we find no exception based upon the reason that the alleged damages may be incapable of measurement."); Boyd v. Clark, 287 F. Supp. 561, 564 (S.D.N.Y. 1968), aff'd, 393 U.S. 316 (1969) ("It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars.").

167. E.g., West End Neighborhood Corp. v. Stans, 312 F. Supp. 1066, 1068 (D.D.C. 1970) (D.D.C. 1970); pp. 1094-1107 infra; accord, Spock v. David, 469 F.2d 1047, 1052 (3d Cir. 1972) (Though the value of constitutional rights "may be difficult of precise measure, that difficulty does not make the claim nonjusticiable under § 1331."); Giancana v. Johnson, 335 F.2d 366, 371 (7th Cir. 1964) (Swygert, J., dissenting) ("The complaint alleged that defendant and his agents deprived plaintiff of the use of his home and that they violated his right of privacy and personal liberty. From these allegations the district court could infer . . . that the amount in controversy exceeded $10,000."); CCCO-West. Region v. Fellows, 359 F. Supp. 644, 647 (N.D. Cal.
allows the district courts to hear actions for alleged constitutional deprivations against state officials regardless of the amount in controversy, strict adherence to the $10,000 requirement in actions brought pursuant to section 1331(a) was found to create an unreasonable and unjust distinction between actions brought against federal, as opposed to state, officials.169

Those courts adopting a middle ground noted that while "price-tagging of fundamental human rights is dangerous business,"170 section 1331(a) does have a $10,000 amount-in-controversy requirement that needs to be satisfied. These courts refused to allow for an automatic finding of the required amount in controversy merely because constitutional rights were in issue, but also refused to dismiss such actions as being incapable of valuation. Rather, the plaintiffs were given the opportunity to satisfy the court that the value of the rights sought to be protected did in fact meet the required jurisdictional amount.171

Thus, while there was general agreement that the amount-in-controversy requirement of section 1331(a) was an unreasonable and "unfortunate gap in the statutory jurisdiction of our federal

168. For the text of § 1343(a)(3), see note 151 supra.

169. Spock v. David, 469 F.2d 1047, 1050 (3d Cir. 1972); Fifth Ave. Peace Comm. v. Hoover, 328 F. Supp. 238, 241-42 (S.D.N.Y. 1971) (footnotes omitted) ("I conclude that the better and modern view in cases where the complaint alleges abridgment of constitutional rights by federal officials is to give the jurisdictional allegations of the complaint a broad and liberal interpretation .... Certainly they may be difficult of evaluation, but 'priceless' does not necessarily mean 'worthless.'"); Cortright v. Resor, 325 F. Supp. 797, 809-10 (E.D.N.Y.), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972) ("The allegation of an amount in controversy in excess of the $10,000 limitation, so far as it applies to grave constitutional deprivations ... has taken on an almost formal and incontestable status.... [Constitutional rights, in this case free speech, are] almost by definition, worth more than $10,000."); Boyd v. Clark, 287 F. Supp. 561, 568 (S.D.N.Y. 1968) (Edelstein, J., dissenting) ("The court could easily assume that freedom from an unconstitutional discrimination exceeds the sum or value of $10,000.00.").


courts,'" judges and commentators alike disagreed as to whether this gap should be filled by the judiciary or by Congress. Either way, strict adherence to the $10,000 requirement was frustrating "the very policy of access to the federal courts which Bivens sought to establish" and led to widespread calls for the removal of "a jurisdictional bar no longer meaningful."

Congress answered these calls in 1976 by amending section 1331(a) to remove the amount-in-controversy requirement in all actions "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Congress joined in the criticism of the amount-in-controversy requirement, noting that "anachronisms in the law of judicial review such as the jurisdictional amount in controversy . . . have outlived their usefulness, continue to cause confusion and injustice, and are overdue for elimination or reform."

Still, there was uncertainty as to whether the amendment applied to damage actions against federal officials in their individual capacities. The amendment referred to actions against federal officials in their official capacities but Congress "omitted an 'under color of legal authority' clause, the phrase commonly used to denote personal damage actions." As such, it was arguable that the amendment did not exempt Bivens actions from the amount-in-controversy requirement. There was also confusion as to
whether the amendment's language, "in his official capacity," required only that the actions complained of be part of the defendant's official activities or required that the action be brought against the defendant in his official capacity.\textsuperscript{180}

Looking beyond the confused judicial treatment of the 1976 amendment to the legislative history and subsequent discussion of the amendment by federal courts, one finds persuasive evidence that Congress intended for the amendment to apply to \textit{Bivens} actions. Specifically, the House Report on the 1976 amendment noted that, as a result of the amendment, "no jurisdictional amount requirement would apply to cases against the Federal Government, a Federal agency, or any official or employee where the plaintiff alleges that the official or employee has acted in his official capacity or under color of law."\textsuperscript{181} The Report made further reference to \textit{Bivens} actions in defining the scope of the amendment by noting that it would remove the amount-in-controversy requirement in cases where "it is impossible to place a monetary value on the right asserted by the plaintiff."\textsuperscript{182} The amendment was passed to assure jurisdiction in the district courts of all cases "seeking 'non-statutory' review of Federal administrative action."\textsuperscript{183} There was no mention of any intention to exclude claims seeking monetary relief, or of claims against an individual official. Rather, "[t]his Act as a whole had a broadly generous objective: to eliminate what had come to be regarded as merely technical restrictions on a given plaintiff's right to seek judicial review of official action."\textsuperscript{184}

\begin{footnotes}
\item[180] \textit{Id.} at 116 (footnote omitted). However, a contrary interpretation was applied in \textit{Fayerweather v. Bell}, 447 F. Supp. 913, 915-17 (M.D. Pa. 1978), where a federal prisoner brought a damage action against prison officials and other federal officials for an alleged taking of his property without due process. Noting that, in regard to three of the defendants, the complaint stated a \textit{Bivens} action, the court held that jurisdiction was proper under \textsection{1331(a)}. The court bypassed any discussion of the amount in controversy, pointing out that the 1976 amendment to \textsection{1331(a)} eliminated the requirement.


\item[183] \textit{Id. at 14, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6121, 6134-35.}

\end{footnotes}
The fact that courts nonetheless dismissed *Bivens* actions for lack of subject matter jurisdiction emphasized the need for the 1980 amendment of section 1331(a), which eliminated the amount-in-controversy requirement in all federal question cases. This amendment was merely the logical extension of the congressional belief, first set forth when passing the 1976 amendment,\(^{188}\) that "[t]he factors relevant to the question whether a Federal court should be available to a litigant seeking protection of a Federal right have little, if any, correlation with the minimum jurisdictional amount."\(^{186}\) Further, the amount in controversy "is an erratic factor to begin with, not necessarily related to either the private or public importance of the issue involved."\(^{187}\) The Senate Report on the 1980 amendment also argued that federal courts should bear the responsibility of deciding federal law,\(^{188}\) thus leading to the conclusion that the amount-in-controversy requirement acted "as an undesirable impediment to the exercise of Federal court jurisdiction,"\(^{189}\) so defined. Congressional drafters concluded, as the 1976 drafters had,\(^{190}\) that "[w]e do nothing to encourage confidence in our judicial system or in the ability of persons with substantial grievances to obtain redress through lawful processes when

\(^{185}\) The Senate Report on the 1980 amendment to § 1331(a) noted that the amendment "will complete the work begun in 1976 and finally eliminate this anomalous barrier to the proper exercise of federal court jurisdiction." S. Rep. No. 827, 96th Cong., 2d Sess. 5 (1980).


\(^{187}\) Id. at 29 (exhibit C: Letter from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Dep't of Justice, to Edward M. Kennedy, Chairman of Subcommittee on Administrative Procedure of Senate Committee on the Judiciary (May 10, 1976)), reprinted in [1976] U.S. Code Cong. & Ad. News 6121, 6148.

\(^{188}\) S. Rep. No. 827, supra note 185, at 1.

\(^{189}\) Id. at 3. The report added that the determination whether the amount-in-controversy requirement is satisfied "wastes scarce judicial resources." Id. at 1.

we close the courthouse door to those who cannot produce $10,000 as a ticket of admission.’”

Any concern for unreasonably increasing the caseload of the federal courts by completely eliminating the amount-in-controversy requirement was addressed in the House report on the 1980 amendment: “Because of the relatively small number of cases involved, the Committee believes that the impact this measure will have on the Federal court caseload will be minimal.”

In short, a Bivens plaintiff will no longer be faced with any difficulties in invoking subject matter jurisdiction in the district courts. A Bivens action is based on the deprivation of fundamental constitutional liberties; it was both illogical and impractical to have barred such claims from federal court because the damages involved were incapable of precise valuation. Removal of the amount-in-controversy requirement in section 1331(a) was a necessary and just change in federal jurisdiction.

C. Statutes of Limitations

Neither Congress nor the Supreme Court has ever expressly determined the appropriate limitations period for Bivens actions. As such, the lower courts are guided only by reference to the rule mandating that in the absence of a congressionally created statute of limitations for a federal cause of action, the district courts should apply the forum state’s limitations period for analogous types of state actions. While this rule seems simple to apply, the courts have been unable to agree upon which state action is most closely analogous to a Bivens action, leaving plaintiffs unsure of which limitations period a court will deem appropriate. In New York alone, three different federal courts have made four different deter-


192. Id., reprinted in [1980] U.S. CODE CONG. & AD. NEWS 9123, 9124. This concern was also addressed in the House report on the 1976 amendment: “According to leading authorities, elimination of the amount-in-controversy requirement in Federal question cases, even if it were also to be eliminated in strictly private litigation, will have no measurable impact on the caseload of the Federal courts.” H.R. REP. No. 1656, supra note 177, at 15 (footnote omitted), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6121, 6136; accord, S. REP. No. 996, 94th Cong., 2d Sess. 15 (1976).


194. Note, supra note 9, at 682.
minations as to which statute of limitations should apply in \textit{Bivens} actions.\textsuperscript{195}

In \textit{Ervin v. Lanier},\textsuperscript{196} the plaintiff brought an action in the Eastern District of New York for damages against various United States law-enforcement officials and Pan American Airlines for their alleged physical and mental abuse of the plaintiff during and after his arrest. Specifically, the plaintiff claimed that after his arrest in East Germany for hijacking a jet to Cuba, he was beaten and coerced into signing papers of repatriation.\textsuperscript{197} Noting that “the proper response to an unspecified limitations period in a federal action is the application of the limitations period for analogous New York actions,”\textsuperscript{198} the court found that either the three-year period provided by section 214(2) of New York’s Civil Practice Law and Rules,\textsuperscript{199} governing actions based upon a liability created by statute, or the one-year period provided by section 215(3),\textsuperscript{200} generally applicable in intentional tort actions, could be applied in \textit{Bivens} actions.\textsuperscript{201} The court decided that section 214(2), the three-year period, was more appropriate, noting that “a judicial preference has been indicated for treating federal defendants in \textit{Bivens} actions in the same way as state defendants in Civil Rights Act actions.”\textsuperscript{202}


\textsuperscript{196} 404 F. Supp. 15 (E.D.N.Y. 1975).

\textsuperscript{197} \textit{Id.} at 17.

\textsuperscript{198} \textit{Id.} at 20.

\textsuperscript{199} New York applies a three-year statute of limitations to “an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215.” \textit{N.Y. CIV. PRAc. LAw} § 214(2) (McKinney Supp. 1980). (Section 214(2) would thus apply to actions arising under 42 U.S.C. § 1983 (Supp. III 1979)).

\textsuperscript{200} New York applies a one-year statute of limitations to “an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law.” \textit{N.Y. CIV. PRAc. LAw} § 215(3) (McKinney 1972).

\textsuperscript{201} 404 F. Supp. at 20.

\textsuperscript{202} \textit{Id.} In De Malherbe v. International Union of Elevator Constructors Local 8, 449 F. Supp. 1335 (N.D. Cal. 1978), the court noted that while a \textit{Bivens} action is not literally a statutory cause of action, applying the limitations period for actions based upon a liability created by statute allows for “uniformity between \textit{Bivens} and § 1983 actions.” \textit{Id.} at 1351. In Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), \textit{cert. denied}, 438 U.S. 907 (1978), where the claim alleged that constitutional deprivations were committed by both state and federal officials, the court held that the claim against the state officials brought under the Civil Rights Act was governed by Illinois’ five-year statute of limitations for claims based upon a liability created by statute. \textit{Id.} at 335. However, this limitations period was held inapplicable to \textit{Bivens} ac-
Thus, while a *Bivens* action is not actually statutorily created, the court chose the limitations period for actions based upon a liability created by statute to avoid treating state and federal officials differently in similar circumstances.

Just four days later the Southern District of New York, in *Felder v. Daley*, held that section 215(3), the one-year statute of limitations for intentional torts, governed the *Bivens* action under consideration. Plaintiffs had alleged that the defendants, including a federal law-enforcement officer, illegally entered the plaintiffs’ apartment by smashing the door with a sledge hammer, and then ransacked the apartment and physically molested one of the plaintiffs. The court held that the cause of action sounded in intentional tort and therefore applied the one-year limitations period found in section 215(3).

The confusion grew worse as the Eastern District applied yet another statute of limitations to a *Bivens* action in *Regan v. Sullivan*. The plaintiff in *Regan* alleged that various federal law-enforcement officers had, without probable cause, arrested and searched him, and authorized the filing of a criminal complaint against him, in violation of his constitutional rights. The court departed from its ruling in *Ervin*, where it had held that *Bivens* actions are governed by section 214(2), the three-year statute of limitations for actions based upon a liability created by statute, noting that “[u]nless a cause of action itself is founded upon a statute, CPLR § 214(2) cannot apply.” The court also rejected the defendant’s claim that a *Bivens* action should be governed by section 215(3), the one-year limitations period for intentional tort claims, pointing out that such an action cannot be equated with intentional

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204. Id. at 1326.
205. Id.
206. Id.
208. 557 F.2d 300, 302 (2d Cir. 1977), rev’g in relevant part 417 F. Supp. 399.
209. 417 F. Supp. at 403.
torts created by state law, as “the conceptual character of the rights are distinctly different.”\textsuperscript{210} Instead, the court held\textsuperscript{211} that the appropriate statute of limitations for this \textit{Bivens} claim was provided by section 215(1) of New York's Civil Practice Law and Rules,\textsuperscript{212} which states that an action against a sheriff, coroner, or constable based on action taken in his or her official capacity must be commenced within one year.

The district court's ruling in \textit{Regan} was overturned on appeal.\textsuperscript{213} The Second Circuit noted that New York's laws provide four limitations statutes that could conceivably govern a \textit{Bivens} action,\textsuperscript{214} including the previously discussed sections 214(2),\textsuperscript{215} 215(1),\textsuperscript{216} and 215(3),\textsuperscript{217} and section 213(1) of New York's Civil Practice Law and Rules, which applies a six-year period to “an action for which no limitation is specifically prescribed by law.”\textsuperscript{218} The circuit court agreed with the lower court's rejection of section 215(3), the limitations period for intentional torts, noting that a constitutional deprivation is not analogous to a common law or state tort claim.\textsuperscript{219} The court disagreed with the lower court's use of section 215(1), the limitations period for claims against a sheriff, coroner, or constable, noting that “[n]othing in the history indicates a legislative intent to extend the benefits of § 215(1) to law enforcement officers other than those specifically named.”\textsuperscript{220} Thus the court concluded that the \textit{Bivens} action was governed by either section 214(2), the three-year period for actions to recover upon a statutory liability, or section 213(1), the six-year period for actions for which no limitation has been set, and that in either case the plaintiff's claim was not time-barred.\textsuperscript{221}

One possible remedy for the confusion created by these dif-

\textsuperscript{210} Id.; accord, Beard v. Robinson, 563 F.2d 331, 338 (7th Cir. 1977).
\textsuperscript{211} 417 F. Supp. at 403-04.
\textsuperscript{212} New York applies a one-year statute of limitations to “an action against a sheriff, coroner or constable, upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty, except the non-payment of money collected upon an execution.” N.Y. Civ. Prac. Law § 215(1) (McKinney 1972).
\textsuperscript{213} 557 F.2d 300 (2d Cir. 1977).
\textsuperscript{214} Id. at 304.
\textsuperscript{215} For the text of § 214(2), see note 199 supra.
\textsuperscript{216} For the text of § 215(1), see note 212 supra.
\textsuperscript{217} For the text of § 215(3), see note 200 supra.
\textsuperscript{219} 557 F.2d at 304.
\textsuperscript{220} Id. at 305.
\textsuperscript{221} Id. at 307; cf. Logiurato v. ACTION, 490 F. Supp. 84, 90-91 (D.C. Cir. 1980) (court applied District of Columbia's three year catch-all limitations period for actions for which there is no statute of limitations on point).
fering decisions would be the application of a federal statute of limitations for Bivens actions. However, the Supreme Court has noted that "[a] special federal statute of limitations is created, as a matter of federal common law, only when the need for uniformity is particularly great or when the nature of the federal right demands a particular sort of statute of limitations."222 Bivens actions do not satisfy either of these criteria and as such no court has fashioned an applicable federal common law limitations period.223 As to the first criterion, a federal statute cannot be drafted by the courts based on a need for uniformity as the nature of such uniformity is yet to be agreed upon and is particularly complex. Uniformity in this area can exist in varying forms, including "nationwide uniformity among federal courts for all Bivens actions; uniformity as between treatment of this right and of its analogue, the Civil Rights Act; or uniformity as between treatment of this federal right and of State rights of a related conceptual character."224 Thus, while there is a federal interest in selecting a uniform statute of limitations, complete uniformity could not possibly be achieved by the judiciary in view of the multiple concerns organized under the heading, "Bivens actions," and in light of the still unsettled status of the action's substantive law.225 The second criterion can not be met because Bivens actions do not demand a particular sort of limitations period. In fact, "[t]he variety of constitutional torts makes it somewhat surprising that the same limitations provision would or should apply to every type of Bivens action. Factors unique to one type may require a different . . . statute of limitations than that appropriate for other types."226

A second solution, indeed the practical answer to this problem, would be a legislative determination of the appropriate statutes of limitations for Bivens actions.227 In creating a federal statute, Congress can be assured that federal interests and policies will be fostered to the extent that the substantive action should be de-

223. Note, supra note 9, at 680 n.59.
226. Id. at 1343.
227. The court in De Malherbe noted that "[t]he inherent arbitrariness of statutes of limitations makes them a peculiarly appropriate subject for legislative rather than judicial control." Id. at 1352 (citing Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945)).
Further, absence of federal statutes of limitations for federal causes of action "forces federal courts into an uncertain, problematic search." and leaves plaintiffs unsure of the time period with which they must contend. Moreover, if a plaintiff incorrectly anticipates the statute of limitations ultimately applied by the trial court, his or her claim may be unfairly time-barred; such uncertainty undermines "the principle of access to the federal judiciary voiced by the Supreme Court in Bivens." Yet, until Congress does act on this question, plaintiffs must either attempt to anticipate the limitations period that the court will apply or file their claims within the time period allowed by the shortest statute of limitations that may potentially be applied by the court.

D. The Need for Congressional Action

Since the creation of the cause of action in 1971, many Bivens plaintiffs have been unable to have their claim adjudicated due to various procedural obstacles. In light of the removal of section 1331(a)'s amount-in-controversy requirement, establishing subject matter jurisdiction in the district courts will no longer present any problems for a Bivens plaintiff. The problems raised by the need to anticipate the statute of limitations that will be applied by the court can likewise be corrected only through congressional action. The recent decision of the Supreme Court barring any future use of section 1391(e) for Bivens actions is the most significant of the remaining procedural obstacles. With his or her choice of forum limited to the district where the cause of action arose or where all the defendants reside, a Bivens plaintiff will often be faced with the cost and inconvenience of bringing his or her claim far from home. The plaintiff will also often be confronted with the problem of serving process on an out-of-state defendant, which can now be accomplished only by satisfying the forum state's long-arm statute. Thus the plaintiff will then have to satisfy the court that the defendant has certain requisite contacts with the state in which the district court sits.

228. The Supreme Court has recognized that "'[s]tate legislatures do not devise their limitations periods with national interests in mind . . . '" Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977).


230. Lehman, supra note 163, at 550.
In short, there is serious potential for frustrating the institution of a \textit{Bivens} action. Congress must see to it that plaintiffs with legitimate federal causes of action are not denied their day in federal court because of unreasonable and unnecessary procedural technicalities. Specifically, in keeping with due process, Congress should allow for nationwide service of process from all federal courts, as long as venue and subject matter jurisdiction are properly satisfied. Alternatively, Congress could draft statutory guidelines for instituting a \textit{Bivens} action, similar to the statutes governing the analogous section 1983\textsuperscript{231} claim.\textsuperscript{232} But whatever the plan of action chosen, Congress must not let the \textit{Bivens} cause of action become meaningless: “Few more unseemly sights for a democratic country operating under a system of limited governmental power can be imagined than the specter of its courts standing powerless to prevent a clear transgression by the government of a constitutional right of a person with standing to assert it.”\textsuperscript{233}

V. IMMUNITIES

Constitutional tort plaintiffs often find that once they have overcome procedural obstacles to filing a claim\textsuperscript{1} and substantive barriers to stating a cause of action,\textsuperscript{2} they must then grapple with an array of bars and defenses to their claims. The absolute immunity allowed certain officials, such as legislators,\textsuperscript{3} prosecutors,\textsuperscript{4} and

\begin{itemize}
\item \textsuperscript{231} 42 U.S.C. § 1983 (Supp. III 1979).
\item \textsuperscript{232} In \textit{Bivens} itself, Chief Justice Burger advocated establishing a statutory scheme that would provide for the institution of \textit{Bivens} actions. 403 U.S. at 422-23 (Burger, C.J., dissenting).
\item \textsuperscript{233} Bivens, 409 F.2d 718, 723 (2d Cir. 1969) (citation omitted).
\end{itemize}

1. See pp. 1018-1056 \textit{supra} for a discussion of the procedural problems encountered in a \textit{Bivens} action. The various \textit{Bivens} opinions will hereinafter be cited as Bivens.

2. See pp. 970-1018 \textit{supra} for a discussion of the substantive problems encountered in a \textit{Bivens} action.


judges,\textsuperscript{5} acts as a total bar to suit, while the defense of good faith is available to other defendants.\textsuperscript{6} Thus plaintiffs often find themselves without a remedy for the violation of a constitutional right in spite of advances made on the procedural and substantive fronts. Even if the plaintiff succeeds in piercing the veil of immunity, the victory is often Pyrrhic because the individual official is frequently judgment proof.\textsuperscript{7} In addition, a Bivens plaintiff cannot sue the employing federal agency on a respondeat superior theory.\textsuperscript{8} The cause of action is therefore often nothing more than a paper tiger.

The existence of any form of immunity in a Bivens suit initially seems paradoxical—for it suggests that the Constitution applies to some people but not to others.\textsuperscript{9} In a democracy based on the prop-

\begin{footnotes}
\item[9] When the Supreme Court held that Bivens' complaint stated a cause of action for damages, 403 U.S. 388, 397 (1971), it remanded the case to the Court of Appeals for the Second Circuit, which held that the defendant-agents of the Federal Bureau of Narcotics, though not absolutely immune to suit, 456 F.2d 1339, 1347 (2d Cir. 1972), would be entitled to defenses of good faith and probable cause. \textit{Id.} at 1347-48. Good faith or qualified immunity is an affirmative defense that must be pleaded by the defendant. It is usually a question of fact for the jury. \textit{Id.} at 1348. The same rule applies in § 1983 actions. \textit{E.g.}, Gomez v. Toledo, 446 U.S. 635 (1980).
\end{footnotes}
osition that no person is above the law, judicial recognition of immunity suggests that some government officials may violate the law with impunity. Totally eliminating absolute and qualified immunity, however, would make constitutional violations strict liability torts—the defendant would be liable regardless of the good faith performance of duties. Such a state of affairs would discourage many people from seeking public office or government jobs. Those already working in government would be deterred from acting innovatively and courageously, fearing retaliation from those adversely affected by their decisions. Moreover, it seems manifestly unfair to punish an official for exercising that discretion demanded by ordinary job responsibilities, especially in the absence of bad faith. Alternatively, waiving sovereign immunity and allowing suit directly against the federal government would mean that the public would bear the cost of private injuries and the courts would be flooded with still more litigation.

This section will analyze the conflicting policy goals. It will then propose a solution to the immunity dilemma seeking to compensate the injured, deter the lawbreakers, and still allow law-abiding officials to perform their jobs without being harassed by


12. See 416 U.S. at 239-40; 177 F.2d at 581.

13. Owen v. City of Independence, 445 U.S. 622, 669-71 (1980) (Powell, J., dissenting). The cost of private wrongs can be a tremendous financial burden on limited municipal treasuries. A jury in Alaska, for example, recently awarded almost $500,000 to a policeman removed from duty without due process after he was accused of racism and brutality. Id. at 670 n.11 (Powell, J., dissenting) (citing Wayson v. City of Fairbanks, 22 ATLA L. Rep. 222 (Alaska Super. Ct. 4th Dist. Jan. 24, 1979)).

14. Justice Rehnquist has pointed out that the elimination of absolute immunity for executive officials would increase the caseload of the already over-burdened federal courts. Butz v. Economou, 438 U.S. at 526 (Rehnquist, J., concurring in part and dissenting in part). Waving sovereign immunity would have a similar effect. Civil rights actions have dramatically increased over the last 20 years. In fiscal year 1960 there were 247 civil rights cases filed in federal district courts. [1970] DIR. OF AD. OFFICE OF U.S. CTS. ANN. REP. 109. By fiscal year 1970 there were 3,985 such suits. Id. In the year ending June 30, 1980, there were 12,944 such suits, in addition to 13,000 civil rights suits filed by prisoners, for a total of 25,944. [1980] DIR. OF AD. OFFICE OF U.S. CTS. ANN. REP. 61 table 19, 62 table 21. See Friedman, The Good Faith Defense in Constitutional Litigation, 5 HOFSTRA L. REV. 501, 501-03 (1977).
the threat of unfounded litigation. The first part of the analysis will trace the origin and development of absolute immunity, which acts as a total bar to suit even though the tortfeasor has acted maliciously or willfully. The focus will be on the judiciary's tendency to limit the extent of absolute immunity by examining the activity or function of the official rather than looking to status in the hierarchy of government as a per se litmus test. Cases brought pursuant to section 1983 will also be discussed, since the Supreme Court has stated that immunities developed for state officials should be made available to federal officials as well. The section's second part will analyze the good faith defense—a qualified immunity that has severely limited the incidence of recovery in Bivens suits. It will be argued that eliminating this defense, without offsetting changes in current law, will have adverse effects on the conduct of government business by making officials second guess their decisions in fear of potential liability for bona fide errors in judgment. Third, it will be suggested that the time has come to allow suits based on a respondeat superior theory against the federal government for the constitutional violations of its employees. The fourth part will focus on the outdated concept of sovereign immunity, which prohibits a plaintiff from recovering damages directly from the United States or from an individual state when sued under the fourteenth amendment. Finally, it will be suggested that the only way to satisfy the twin goals of the Bivens

15. When absolute immunity is granted, the intent or mental state of the official becomes irrelevant. See, e.g., Gregoire v. Biddle, 177 F.2d at 579-81.
17. The statute provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 
19. See, e.g., Note, supra note 8, at 685-90. The jury is more likely to favor the defendant official over the sometimes-suspect plaintiff, who may have a criminal record or be a prison inmate. Id. at 692-93.
21. Many studies have attacked sovereign immunity. See, e.g., Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1 (1963); Newman, supra note 7, at 458.
action—compensation of the victim and deterrence of the law-breakers22—while fostering the public interest in effective and efficient government, is to permit the Bivens plaintiff to sue both the United States and the individual defendant jointly. Under this proposal, the government will be held strictly liable for its employees' good faith constitutional violations and the individual officials will be held liable only on a showing of malice.23 Thus the plaintiff whose constitutional rights have been violated will have a remedy without regard to an official's good faith, while an individual defendant who made a good faith error in judgment will not be forced to pay damages personally. In support, it will be posited that the abolition of sovereign immunity provides for more equitable risk-spreading among the citizenry.

A. Absolute Immunity

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.24

The judicial tendency to grant absolute immunity to certain government officials seems to belie this familiar proposition. The argument most often offered to justify absolute immunity is that government can operate efficiently only if certain officials are free to perform their functions unfettered by the threat of law suits—even when their actions violate clearly established constitutional rights.25 Yet the law—and the Constitution in particular—is "the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."26 These principles suggest that absolute immunity is foreign to our system of government. Nonetheless, the Court has consistently declined to abolish the doctrine in Bivens or section 1983 actions, although limiting it to certain officials acting

22. Bivens, 403 U.S. at 392.
23. This proposal was the subject of a recent report. COMMITTEE ON FEDERAL LEGISLATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REMEDIES FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS BY FEDERAL OFFICERS AND EMPLOYEES: PROPOSED AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT 3-5 (1979).
within the scope of their duty.\textsuperscript{27} The courts have relied on the well-established common law roots of absolute immunity, particularly in holding that Congress could not have intended to eliminate it when enacting section 1983.\textsuperscript{28} (The statute does not address the immunity question on its face.\textsuperscript{29}) In light of the Supreme Court's statement that immunities governing section 1983 and \textit{Bivens} suits should be the same,\textsuperscript{30} a study of immunity under section 1983 is the starting point for any discussion of immunity in \textit{Bivens} suits. Common law immunities, developed in state tort actions, may also be informative, although the Court has noted that the immunities available in cases involving constitutional torts will not be entirely controlled by state common law immunity doctrines.\textsuperscript{31}

1. Judicial Immunity.—Absolute immunity has been granted to judges in the performance of judicial acts\textsuperscript{32} within the jurisdiction of the court.\textsuperscript{33} One of the earliest Supreme Court decisions dealing with these issues was \textit{Bradley v. Fisher},\textsuperscript{34} decided in 1872. In that case an attorney brought a civil action against a judge, alleging that a declaration of the judge had disbarred him without just cause or an opportunity to be heard. The Court held that the judge was absolutely immune from suit, "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff."\textsuperscript{35} The Court stated that the principle of judicial immunity was well established in England for many centuries and "in all countries where there is any well-ordered system of jurisprudence."\textsuperscript{36} A judge must be "free to act upon his own convictions, without apprehension of personal consequences to himself."\textsuperscript{37} Since it is inevitable that the judge's decisions will make at least one party unhappy, the fear of liability to a

\begin{itemize}
\item \textsuperscript{27} See cases cited notes 3-5 supra.
\item \textsuperscript{28} See, \textit{e.g.}, Owen v. City of Independence, 445 U.S. 622, 635-38 (1980); Imbler v. Fachtman, 424 U.S. 409, 417 (1976).
\item \textsuperscript{29} For the text of § 1983, see note 17 supra.
\item \textsuperscript{30} Butz v. Economou, 438 U.S. at 500.
\item \textsuperscript{31} \textit{Id.} at 495.
\item \textsuperscript{32} For a good discussion of what constitutes a judicial act, see Stump v. Sparkman, 435 U.S. 349, 360-64 (1978). For a recent update, see Lopez v. Vanderwater, 620 F.2d 1229, 1234-35 (7th Cir. 1980).
\item \textsuperscript{33} For a general definition of jurisdiction, in the context of judicial immunity, see Stump v. Sparkman, 435 U.S. at 357-60. For a more recent discussion, see Turner v. Raynes, 611 F.2d 92, 94-97 (5th Cir. 1980), \textit{cert. denied}, 101 S. Ct. 269 (1981).
\item \textsuperscript{34} 80 U.S. (13 Wall.) 335 (1871).
\item \textsuperscript{35} \textit{Id.} at 347.
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\end{itemize}
disappointed party “would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.” 38 The Bradley Court favored absolute immunity even in the face of malicious or corrupt activities or those in excess of jurisdiction. 39 The only limitation on the judge’s immunity, pursuant to Bradley, involves action where the judge is totally devoid of jurisdiction. The Court reasoned that in such cases “an authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.” 40 In all other instances, the remedy rested only in removal of a corrupt judge through the legislative process. 41

The reasoning of Bradley v. Fisher was adopted by the Second Circuit in Yaselli v. Goff, 42 an action against a United States attorney for malicious prosecution. In stating that judicial officers are absolutely immune to civil suits, the court echoed the British common law and the public policy considerations stressed in Bradley. After stating that the protection allowed judges extended also to prosecutors, witnesses, grand jurors, and petit jurors, 44 the court held a U.S. Attorney to be a quasi-judicial officer of the government entitled to absolute immunity for acts within the scope of authority, notwithstanding the presence of malice. 47 The court reasoned that public policy “requires that persons occupying such important positions and so closely identified with the judicial department of the government should speak and act freely and fearlessly in the discharge of their important judicial functions.” 48

The classic defense of absolute immunity for judges and judicial officers, indeed for all to whom it has been extended, was offered by Judge Learned Hand in his 1949 opinion for the Second Circuit in Gregoire v. Biddle: 49

38. Id.
39. Id. at 351.
40. Id. at 352.
41. Id. at 354.
42. 12 F.2d 396 (2d Cir. 1926), aff’d per curiam, 275 U.S. 503 (1927).
43. Id. at 399.
44. Id. at 403.
45. Id. at 404.
46. Id. at 406.
47. Id.
48. Id.
49. 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).
It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant threat of retaliation.

Judge Hand's statement summarizes the conflicting policy goals at issue. His solution, however, seems shortsighted insofar as it advocates the availability of absolute immunity to all government officials. It is doubtful whether the Justice Department officials and immigration officials sued in Gregoire would now be entitled to absolute immunity unless they performed a judicial or quasi-judicial function. The procedural safeguards inherent in the judicial process—cross-examination of witnesses, the possibility of correcting errors on appeal, and the nature of adversary proceedings—did not apply to the action taken by the executive officials ac-

50. Id. at 581.
51. Id. at 579.
52. See Butz v. Economou, 438 U.S. at 508-17, where the Court emphasized the official's function rather than status. Only those immigration officials performing a judicial or prosecutorial function would be entitled to absolute immunity under Butz.
53. See id. at 512. The Court pointed out that judicial immunity was justified because of the many procedural safeguards built into the judicial process:
Advocates are restrained not only by their professional obligations, but by
corded the protection in *Gregoire*. The common law immunity of judges was extended to section 1983 actions in *Pierson v. Ray*.

In that case members of a prayer pilgrimage consisting of white and black clergymen were arrested and charged with breaching the peace when they attempted to use a segregated interstate bus terminal in Jackson, Mississippi, in 1961. When the statute under which they were convicted was declared unconstitutional, they brought a civil rights action for damages against the police officers who arrested them and the municipal police justice who convicted them. The Supreme Court reasoned that Congress had not intended to abolish well-established judicial immunities in enacting section 1983 and repeated the traditional reliance on appellate review. The correctability of error on appeal provides critical support for judicial immunities. Where unfettered and meaningful access to judicial process is available, the redress of substantive infringements is at least theoretically possible.

Appellate review, however, does not always provide a solution, even in theory. In *Stump v. Sparkman*, a young woman sterilized without her knowledge at her mother's request brought a section 1983 action against the judge who had approved the petition for sterilization. The Supreme Court concluded that granting the petition was a “judicial act” within the court's general jurisdiction. According to the Court, a “judge is absolutely immune

the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decision-making process, there is a less pressing need for individual suits to correct constitutional error.

*Id.*

54. 386 U.S. 547 (1967).
55. Record at 1-6.
56. 386 U.S. at 554-55.
57. *Id.* at 554.
59. *Id.* at 360.
60. *Id.* at 358. Courts have distinguished between complete lack of jurisdiction and specific acts in excess of jurisdiction, following the lead of the Supreme Court in *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 351-53. Judges are not absolutely immune when they lack all jurisdiction over the subject matter, but are absolutely immune when they act in excess of their jurisdiction. Thus, in *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980), a Texas justice of the peace with limited jurisdiction was held absolutely immune even though he convicted the plaintiff of a nonexistent crime. Such an act was simply in excess of his jurisdiction. *Id.* at 97.
from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."\(^{61}\) Despite the impossibility of correcting the judge's decision on appeal, the majority held that "the tragic consequences of Judge Stump's actions" should not affect his total immunity from suit.\(^{62}\)

Justice Stewart, in a vigorous dissent, went beyond the "tragic consequences" and reasoned that the principles counseling the provision of judicial immunity were not implicated in this case:

Not one of the considerations thus summarized in the \textit{Pierson} opinion was presented here. There was no "case," controversial or otherwise. There were no litigants. There was and could be no appeal. And there was not even the pretext of principled decision-making. The total absence of any of these normal attributes of a judicial proceeding convinces me that the conduct complained of in this case was not a judicial act.\(^{63}\)

Calling the challenged conduct "lawless," Justice Stewart concluded that "if intimidation would serve to deter the occurrence, that would surely be in the public interest."\(^{64}\) Justice Powell also dissented, on the grounds that the reasoning of \textit{Bradley} and \textit{Pierson} was inapposite as it assumed the availability of an alternative forum where private rights could be vindicated.\(^{65}\) Judge Stump's action made resort to appellate review or other judicial remedy impossible.\(^{66}\)

The \textit{Stump} dissents correctly focus on the availability of alternative remedies as a crucial prerequisite to allowing judicial immunity. Where no other remedy exists, or where the judicial action renders alternative remedies meaningless, the immunity accorded judges should be limited. Recent decisions have limited the scope of judicial immunity by not allowing it as a bar to action for equitable relief.\(^{67}\) Judicial immunity has also been held inapplicable to judges' ministerial acts,\(^{68}\) extrajudicial acts (including issuing

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61. 435 U.S. at 359.
62. \textit{Id.} at 363.
63. \textit{Id.} at 368-69 (Stewart, J., dissenting) (emphasis in original).
64. \textit{Id.} at 369 (Stewart, J., dissenting) (footnote omitted).
65. \textit{Id.} at 370 (Powell, J., dissenting).
66. \textit{Id.} (Powell, J., dissenting). The \textit{Stump} decision has been strongly attacked. L. Tribe, \textit{American Constitutional Law} 4-5 (Supp. 1979).
67. \textit{E.g.}, Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (state's highest court and its members are proper defendants in § 1983 action for declaratory and injunctive relief); Boyd v. Adams, 513 F.2d 83, 86-87 (7th Cir. 1975) (judicial and prosecutorial immunity will not bar action for injunction).
68. Atcherson v. Siebenmann, 605 F.2d 1058, 1064 (8th Cir. 1979); Doe v.
press releases\textsuperscript{69} or acting as a prosecutor\textsuperscript{70}, and for those acts not even remotely judicial.\textsuperscript{71} Because of their extrajudicial nature, the excepted activities do not carry with them the protections normally adhering to judicial activity.

The exceptions emphasize the importance of focusing on function rather than status. Where a judge or quasi-judicial officer acts improperly in the performance of duties directly related to litigation, the decision to afford an absolute immunity represents a balancing of competing process values. Thus, to the extent that values of equality of treatment, dignity, and general respect for the legal system are less than perfectly served in the presence of immunity,\textsuperscript{72} the loss may be offset by protections inherent in the legal system and by the protection afforded all litigants by the presence of a judiciary unfettered by vexatious litigation. Even in the extreme case where an individual is convicted of a nonexistent crime because of a judge's or prosecutor's malicious personal motives,\textsuperscript{73}

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\textsuperscript{69} In Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), cert. denied, 405 U.S. 938 (1980), a black police lieutenant brought suit against a judge for making racist remarks about him to the press over the course of a year while he was awaiting trial on criminal charges stemming from proceedings allegedly improperly instigated by the judge. 419 F. Supp. 30, 31-32 (E.D. Wis. 1976) (judge's motion to dismiss denied); 436 F. Supp. 143, 145-46 (E.D. Wis. 1977) (judge's motion for partial summary judgment granted in part and denied in part). The court held that these acts were extrajudicial because they were not functions normally performed by a judge. Since the press releases took place outside the courtroom, they were undertaken in total absence of jurisdiction. 605 F.2d at 336-37.

\textsuperscript{70} In Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir. 1980), the defendant-judge was held not absolutely immune because acting as a prosecutor was not within his jurisdiction. Id. at 1235-37. In events stemming from Lopez's failure to pay rent in a building that Vanderwater allegedly owned, Vanderwater had Lopez arrested for criminal trespass after he was found in his apartment after being told to move out. Vanderwater determined the offense to be charged, signed a warrant for Lopez's arrest, made entries on a standard plea form indicating that Lopez had pleaded guilty and waived his right to jury trial, and then arraigned, convicted, and sentenced Lopez in absentia to 240 days in prison. Id. at 1232.

\textsuperscript{71} In Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978), a verdict of $80,000 compensatory and $60,000 punitive damages was upheld. There a judge sent out for coffee from a local sandwich vendor. Because the coffee was "putrid," the judge had the vendor dragged into court in handcuffs. The act was considered nonjudicial. Id. at 53.

\textsuperscript{72} See pp. 1095-1097 infra.

\textsuperscript{73} Turner v. Raynes, 611 F.2d 92 (5th Cir. 1980), cert. denied, 101 S. Ct. 269 (1981), involved a boundary dispute between Turner and a neighbor. Raynes, a
the plaintiff may resort to the appellate process. The key part of the inquiry then becomes deciding whether the act complained of is within the judicial function.

_Butz v. Economou_74 was the first case brought on a _Bivens_ theory to present the judicial-immunity question in the Supreme Court. A commodities exchange merchant brought suit against various Department of Agriculture officials (including the secretary of agriculture, the judicial officer, and the chief hearing examiner), alleging that they had violated his constitutional rights by instituting proceedings against him in retaliation for his criticism of that agency.75 The majority held that the immunity available in a _Bivens_ action against federal officials should be no more restrictive than that afforded state officials in section 1983 actions:76 “To cre-

Texas justice of the peace, issued a peace bond at the request of the neighbor and Turner was required to post bond conditioned on behaving himself peaceably. When the dispute continued, Raynes issued a warrant for Turner’s arrest on charges of “Violation of Peace Bond,” tried and convicted him of this nonexistent crime, and sentenced him to a year and a day in jail. _Id._ at 93. The court held that Raynes acted merely in excess of, rather than in absence of, jurisdiction and was therefore absolutely immune from suit. _Id._ at 96-97. This result is distinguishable from that in _Lopez v. Vanderwater_, 620 F.2d 1229 (7th Cir. 1980), where the judge not only acted in his judicial capacity but also as a prosecutor. There the judge was immune for his judicial acts but not for his prosecutorial acts. See note 70 supra. The _Turner_ decision was based on the distinction between acts that are in excess of a judge’s jurisdiction and those that are in total absence of all jurisdiction over the subject matter. The _Lopez_ decision turns on the definition of a judicial act.

75. _Id._ at 481-82.
76. _Id._ at 500-01; see _Mark v. Groff_, 521 F.2d 1376 (9th Cir. 1975). The court there reasoned that “the rights at stake in a suit brought directly under the Bill of Rights are no less worthy of full protection than the constitutional and statutory rights protected by § 1983.” _Id._ at 1380. In _States Marine Lines, Inc. v. Shultz_, 498 F.2d 1146 (4th Cir. 1974), the court suggested that “the qualified nature of executive immunity would appear to be equally applicable to federal executive officers.” _Id._ at 1159. In _Anderson v. Nosser_, 438 F.2d 183 (5th Cir. 1971), _cert. denied_, 409 U.S. 848 (1972), Judge Bell stated that “all police and ancillary personnel in this nation, whether state or federal, should be subject to the same accountability under law for their conduct.” _Id._ at 205 (Bell, J., concurring). It would be incongruous to create “one law for Athens and another for Rome.” _Id._ (Bell, J., concurring). In _Bivens_, 456 F.2d 1339 (2d Cir. 1972) (on remand), the court stated that having separate standards of immunity for federal officials sued directly under the Constitution and state officials sued for the same violations, but under § 1983, would be “incongruous and confusing.” _Id._ at 1346-47. Other courts had reached similar decisions prior to the Supreme Court’s decision in _Bivens_. See, e.g., _G.M. Leasing Corp. v. United States_, 560 F.2d 1011, 1015 (10th Cir. 1977), _cert. denied_, 435 U.S. 923 (1978); _Jones v. United States_, 536 F.2d 269, 271 (8th Cir.), _cert. denied_, 429 U.S. 1039 (1976); _Weir v. Muller_, 527 F.2d 972 (5th Cir. 1976); _Paton v. La Prade_, 524 F.2d 862, 872 (3d Cir. 1975); _Apton v. Wilson_, 506 F.2d 83, 90-95 (D.C. Cir. 1974); _Brubaker v. King_, 505 F.2d 534, 536 (7th Cir. 1974).
ate a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.” In approving the absolute immunity given to executive officials performing adjudicatory functions, the Court stated: “Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.” The Court, however, authorized a distinction between executive officials performing purely administrative functions and those whose quasi-judicial roles placed them within the Bradley-Pierson line of cases. Stressing the distinction between status and function, the majority pointed out that the “features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process [so that] there is a less pressing need for individual suits to correct constitutional errors.” The extension of judicial immunity to the quasi-judicial acts of executive officials was then a natural step for the Court, as the functional safeguards were present in both instances. Individuals can seek agency or judicial review and therefore are not left entirely without a remedy.

The absolute immunity accorded participants in judicial proceedings—judges, prosecutors, witnesses, grand jurors, and petit jurors—seems at first glance to contradict the stated objectives of a Bivens suit—deterrence of the lawbreakers and compensation of the injured. Upon closer examination, however, the award of absolute immunity is justified when plaintiffs whose rights are violated in a judicial proceeding have the protection of procedural safeguards inherent in our legal system. The focus of any such inquiry must first be on the process at issue. If, as for Webster

77. 438 U.S. at 504.
78. Id. at 512.
79. Id. The Court continued:
[T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury.

Id. (footnote omitted).
80. Id. at 514.
Bivens, "it is damages or nothing," the process-based justification for absolute judicial immunity falls through its own foundation. The quintessential conflict, however, may never be reached. For when the action complained of is within judicial or quasi-judicial function, procedural protections should adhere by definition.

2. Legislative Immunity.—Immunity for Members of Congress has its origins in the Constitution's speech or debate clause. The first case to discuss legislative immunity in a constitutional tort context was *Tenney v. Brandhove*. The plaintiff brought a section 1983 action alleging the deprivation of his constitutional rights in connection with an investigation by a committee of the California legislature. After tracing the history of legislative freedom in the United States and England, the Court addressed the question whether section 1983 was to be interpreted as overturning this traditional legislative freedom. The Court declared: "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason . . . ." The Court noted that the privilege is absolute as long as the parties "were acting in the sphere of legitimate legislative activity." The legislators would not be immune if they acted outside their legislative role. The privilege, however, is not subject to judicial inquiry into legislative motive. In order to find that "a committee's investigation exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." The Court also relied on the availability of nonjudicial correction of error, the voters' power to remove legislators either directly (through nonelection or recall) or indirectly (through available impeachment procedures).

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81. Bivens, 403 U.S. at 410 (Harlan, J., concurring in the judgment).
82. U.S. CONST. art. 1, § 6, cl. 1.
84. Id. at 369.
85. Id. at 372-75. The Court pointed out that legislative immunity had its origin in British parliamentary struggles. The American founding fathers deemed legislative freedom of speech and action so important that it was written into both the Articles of Confederation and the Constitution. Id. at 372. The Court also noted that forty-one states protect legislative freedom by specific constitutional provisions. Id. at 375 n.5.
86. Id. at 376.
87. Id.
88. Id.
89. Id. at 377 (citations omitted).
90. Id.
91. Id. at 378.
92. Id. Justice Black, in his concurring opinion, pointed out that the Court did
When the activities complained of fall within the sphere of legitimate federal legislative activity, the absolute immunity of the speech or debate clause governs. One important reason for allowing this absolute immunity is that "the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." By "insuring the independence of individual legislators," the cause protects the integrity of the legislative process. Allowing legislators engaged in legitimate legislative activity absolute immunity rather than qualified immunity protects the legislators from the consequences of litigation's results as well as from the burden of defending themselves. Thus absolute immunity has been accorded legislators even when there is proof that they acted maliciously or in furtherance of a conspiracy. The immunity also exists though the acts were clearly illegal or unconstitutional.

The central inquiry in cases involving legislative immunity, then, must be whether the activity complained of falls within the sphere of legitimate legislative function. In Doe v. McMillan a congressional committee investigating the District of Columbia public school system ordered the printing and distribution of a 450-page report that included attendance records, examinations, and documents concerning disciplinary problems of certain students. The plaintiffs—parents of the school children—sought to enjoin further dissemination of the report because it violated their constitutional right to privacy.

The Court held that the authorization of the investigation, the presentation of the sensitive information in hearings, the preparation of the report, and its publica-

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97. Id. at 83.
98. Id. at 82.
100. Id. at 309.
tion were protected by the speech or debate clause. The Court did not, however, accept the proposition that Congress must also be free to distribute the sensitive material to the public at large regardless of how damaging to an individual's reputation that material might be. Thus the public printer and the superintendent of documents would not be entitled to absolute immunity for printing and distributing the report unless it served the legitimate legislative needs of Congress.

The Court's subsidiary holding in *Doe* is evidence of its reluctance to extend the blanket of absolute immunity to those activities of legislators not essential to the legislative function. Thus, in *Hutchinson v. Proxmire*, the speech or debate clause was held not to protect the issuance of press releases and newsletters by individual Members of Congress. The Court concluded:

A speech by Proxmire in the Senate would be wholly immune and would be available to other members of Congress and the public in the Congressional Record. But neither the newsletters nor the press releases was "essential to the deliberations of the Senate" and neither was part of the deliberative process.

In distinguishing this case from *Doe v. McMillan*, the Court stated: "Voting and preparing committee reports are the individual and collective expressions of opinion within the legislative process. . . . Newsletters and press releases, by contrast, are primarily a means of informing those outside the legislative forum; they represent the views and will of a single Member."

The action of the *Proxmire* Court in limiting legislative immunity evinces the same type of status-function distinction utilized in judicial immunity cases. Members of Congress and state and local legislators are entitled only to absolute immunity essential to legislating. There is no need to protect the activity of legislators

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101. *Id.* at 313.
102. *Id.* at 316.
103. *Id.* at 322-24.
105. *Id.* at 130.
106. *Id.* at 133.
107. There has been considerable debate as to what is "essential to legislating." In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-07 (1975), a congressional committee's right to subpoena the plaintiff's records was deemed essential to legislating. In *Davis v. Passman*, 442 U.S. 228 (1979), a woman brought suit against a United States Representative for violation of her fifth amendment rights. Ms. Davis had been dismissed from her post as deputy administrative
“outside” the legislative process when the rights of individual citizens are violated. Moreover, the public interest in an effective legislative process applies only to activity conducted within the reasonable boundaries of that process.

Since the legislative process has built-in safeguards, and since the public has a general interest in having an efficient and effective legislature, the absolute immunity accorded legislators acting within the scope of legitimate legislative activity is justified. The concern here is very much the same as in the judicial sphere: The public has an interest in the operation of government that outweighs the interest in redressing private injuries. Private rights must yield to the public good under these circumstances. Except for these two special categories, however, absolute immunity should not exist.

3. Executive Immunity.—High-ranking executive officials traditionally have been accorded absolute immunity from damages for common law tort violations. In Spalding v. Vilas, an 1896 Supreme Court decision, the Postmaster General was held immune in a suit resulting from his circulation among the postmasters of a notice allegedly injuring the plaintiff’s reputation and interfering with his contractual relations. The Court held the presence of mal-
ice irrelevant as long as the acts complained of “did not exceed his authority, nor pass the line of his duty.” The functional approach to the executive immunity question appeared once again, over seventy years later, in Barr v. Matteo. The Supreme Court granted absolute immunity to the acting director of a federal agency sued for malicious defamation by employees suspended for misconduct. The defendant had announced the suspensions in a press release. The Court held that a false and damaging publication—even if issued maliciously—was not actionable as long as its issuance was within the official’s authority.

The long life of absolute executive immunity reached its demise when the Supreme Court confronted the issue for the first time in a section 1983 context. In Scheuer v. Rhodes, a 1974 Court decision, the Governor of Ohio and other state officials were sued for conduct leading to the deaths and injuries of several students on the Kent State campus during an antiwar rally. The Court of Appeals for the Sixth Circuit had cited Spalding and Barr as controlling. The Supreme Court disagreed, reasoning that the purpose of section 1983 would be frustrated if state government officials as a class were totally exempt from liability. The Court noted, however, that all the state officials would be entitled to assert the defense of good faith. The Court believed that the broad responsibilities of the Governor and his principle subordinates mandated the protection of at least some form of immunity: “These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action . . . .” Thus state executive officials no longer share in the blanket of absolute immunity accorded legislators and judicial officials. For the Court to have decided otherwise would have made the guarantees of section 1983 meaningless in the presence of action by state officials.

110. Id. at 499.
111. 360 U.S. 564 (1959).
112. Id. at 575.
115. 416 U.S. at 248.
116. Id. at 247-48.
117. Id. at 247.
The applicability of the Scheuer holding to federal executive officers sued on a Bivens theory first reached the Supreme Court in Butz v. Economou. The Court held that the officials were entitled to only a qualified immunity, except in the performance of judicial functions. Following the reasoning in Scheuer, the Butz Court refused to extend the common law immunity accorded federal executive officials to cases based on constitutional violations:

The liability of officials who have exceeded constitutional limits was not confronted in either Barr or Spalding. . . . Beyond that, however, neither case purported to abolish the liability of federal officers for actions manifestly beyond their line of duty; and if they are accountable when they stray beyond the plain limits of statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability.

The Court's holding thus echoes the principle stated in United States v. Lee, that "[n]o officer of the law may set that law at defiance, with impunity," and is in keeping with the general principles underlying a Bivens suit, insofar as it places a burden on the officials charged with unconstitutional conduct to justify that conduct.

Butz and Scheuer, taken together, suggest that all government officials—even the highest executives of a state—are entitled only to a qualified immunity. Whether that reasoning should be fully extended was presented in Halperin v. Kissinger, where the Court of Appeals for the District of Columbia Circuit held that the President of the United States is not absolutely immune from liability in a Bivens action. The plaintiff in Halperin, a former member of the National Security Council staff, brought suit for damages against ten federal officials, including former President Richard Nixon, alleging that his fourth amendment rights were violated by an illegal wiretap of his home. Since the executive officials sued had not been involved in quasi-judicial activity, the circuit court ruled that they were not absolutely immune from suit and were entitled to only a qualified immunity. In considering the special problem of presidential immunity, the court stated:

119. Id. at 514-17.
120. Id. at 495.
121. 106 U.S. 196, 220 (1882).
122. 606 F.2d 1192 (D.C. Cir. 1979), aff'd by an equally divided Court, 49 U.S.L.W. 4782 (June 22, 1981) (per curiam).
123. 606 F.2d at 1208.
In order to accept defendant Nixon’s argument that he, as a former President, is absolutely immune from suit, we would have to hold that his status as President sets him above the other high Executive officials named as defendants to this action. Such a distinction would have to rest on a determination either that the Constitution impliedly exempts the President from all liability in cases like this or that the repercussions of finding liability would be drastically adverse. Because we are unable to make that distinction, we do not believe he is entitled to absolute immunity to a damage action by a citizen subjected to an unconstitutional or illegal wiretap.\footnote{Clark v. United States, 481 F. Supp. 1086, 1092 (S.D.N.Y. 1979). See also}

The court gave several reasons for its decision. First, there is no constitutional justification for granting the President absolute immunity.\footnote{Id. at 1210-11.} Second, the doctrine of separation of powers does not demand that the President be immune from judicial process.\footnote{Id. at 1211.} According to the court, “[s]uch an abdication of the judicial role would sap the vitality of the constitutional rights whose protection is entrusted to the judiciary.”\footnote{Id.} Third, the court believed that holding the President liable for violation of constitutional rights would not have a significant inhibiting effect on the President’s ability to govern effectively.\footnote{Id. at 1212.} Fourth, qualified immunity would afford sufficient protection, since it would take into consideration the broad range of responsibility and correspondingly broad discretion inherent in the Presidency.\footnote{Id.} Under these circumstances, a plaintiff would have difficulty defeating even a limited immunity.\footnote{Id.} Fifth, there would be no special burden on the President’s time, since representation would be provided by the government.\footnote{Id. at 1213.} Last, our “tradition of equal justice under law” demands that the President be given only qualified immunity.\footnote{Id.}

A President should be afforded absolute immunity only on a showing that the conduct complained of was an exercise of a quasi-judicial function or that it was “essential to the conduct of public business.”\footnote{Id. at 1212.} The President should be treated no differently than

\begin{thebibliography}{9}
\bibitem{124} Id. at 1210-11.
\bibitem{125} Id. at 1211.
\bibitem{126} Id.
\bibitem{127} Id. at 1212.
\bibitem{128} Id.
\bibitem{129} Id.
\bibitem{130} Id. at 1213.
\bibitem{131} Id.
\bibitem{132} Id.
\bibitem{133} Clark v. United States, 481 F. Supp. 1086, 1092 (S.D.N.Y. 1979). See also
\end{thebibliography}
the Governor of a state. Both are bound to obey the Constitution. The only difference between them is the range of their responsibilities—a fact that is considered in the defense of qualified immunity. For the Court to hold otherwise would contradict a long line of cases stating that federal officials sued in a Bivens suit are to be accorded the same immunity as state officials sued under section 1983.134

Federal executive officials sued on a Bivens theory are therefore not absolutely immune from suit. The common law immunity accorded them in state civil actions does not carry over to constitutional violations. Unlike judicial misconduct, which is curbed by procedural safeguards, executive misconduct will go almost wholly unchecked if the courts were to allow high-ranking government officials absolute immunity.

B. Qualified Immunity: The Good Faith Defense

Those officials who are not entitled to absolute immunity in a Bivens suit may still be allowed a qualified immunity, or a good faith defense. The Supreme Court first discussed the good faith defense in the section 1983 context in Pierson v. Ray.135 The Court decided that a police officer sued for fourth amendment violations would be entitled to the common law defense of good faith and probable cause even though the arrest might subsequently be declared unconstitutional.136 This immunity was extended to federal officers by the Second Circuit in the Bivens remand.137 According to the court, to prove the defense of good faith an "officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. . . . We think, as a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection."138 The court was strongly influenced by the fact that law-enforcement officials perform dangerous yet necessary tasks and should not be "left defenseless against the demands of every person who manages

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134. See cases cited note 76 supra.
135. 386 U.S. 547 (1967).
136. Id. at 555-57.
137. 456 F.2d 1339, 1347 (2d Cir. 1972).
138. Id. at 1348.
to escape from the toils of the criminal law.” The court concluded, however, that the necessities of law enforcement must be balanced against the constitutional rights of citizens.

The good faith defense has been extended to officials who are not involved in on-the-street law-enforcement duties. In Scheuer v. Rhodes, the Governor of Ohio, officers of the National Guard, and the president of Kent State University were all given a qualified immunity to suit. The Supreme Court outlined the requirements for establishing such a defense:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Thus, the good faith defense has both an objective and a subjective requirement. The absence of either element will serve to defeat its invocation.

The Scheuer rationale was applied by the Court in Wood v. Strickland. The Court held that a school-board member was entitled to a good faith defense and would be liable only if “he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional

139. Id. at 1347.
140. Id.
142. Id. at 247-48.
143. The defendant must prove that he believed he acted properly (subjective element) and that his belief was reasonable in light of all circumstances (objective element). See, e.g., Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 712 (3d Cir.), cert denied, 439 U.S. 966 (1978); G.M. Leasing Corp. v. United States, 560 F.2d 1011, 1015 (10th Cir. 1977), cert. denied, 435 U.S. 923 (1978); Askew v. Bloemker, 548 F.2d 673, 679 (7th Cir. 1976); White v. Boyle, 538 F.2d 1077, 1080 (4th Cir. 1976); Jones v. United States, 536 F.2d 269, 272 (8th Cir. 1976), cert. denied, 429 U.S. 1039 (1977); Paton v. La Prade, 524 F.2d 862, 872 (3d Cir. 1975); Glasson v. City of Louisville, 518 F.2d 899, 903 (6th Cir.), cert. denied, 423 U.S. 930 (1975).
144. For a thorough analysis of the elements of the good faith defense, see Friedman, supra note 14.
rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . ." 146 The Court also expressed a concern that competent individuals would be deterred from seeking public service positions in the face of potential liability for bona fide errors in judgment. 147

Reliance on state law, even in the presence of constitutional violations, may be sufficient to prove good faith. In O'Connor v. Donaldson, 148 the plaintiff alleged that he was confined to a state mental hospital without treatment even though responsible people had offered to care for him at home. In defending the allegation of unconstitutional conduct, the defendant relied on a state statute authorizing confinement of the mentally ill even in these circumstances. 149 The Court held that the superintendent was entitled to rely on state law in proving his good faith defense. 150

There is, of course, no simple listing of constitutional rights. Thus, in Procunier v. Navarette, 151 the Court held that prison offi-

146. Id. at 322.
147. See id. at 320. Justice Powell, in his separate opinion, suggested that even the good faith defense outlined by the majority does not give school boards enough protection because they are charged with knowledge of the unquestioned constitutional rights of their students. Because of the constant reinterpretation of constitutional rights, Justice Powell believed it to be almost impossible to call any one right "unquestioned." Id. at 329 (Powell, J., concurring in part and dissenting in part). Justice Powell then concluded:

There are some 20,000 school boards, each with five or more members, and thousands of school superintendents and school principals. Most of the school board members are popularly elected, drawn from the citizenry at large, and possess no unique competency in divining the law. Few cities and counties provide any compensation for service on school boards, and often it is difficult to persuade qualified persons to assume the burdens of this important function in our society. Moreover, even if counsel's advice constitutes a defense, it may safely be assumed that few school boards and school officials have ready access to counsel or indeed have deemed it necessary to consult counsel on the countless decisions that necessarily must be made in the operation of our public schools.

Id. at 331 (Powell J., concurring in part and dissenting in part). Even though a finding of good faith will prevent recovery, school-board members would have to bear the cost of defending themselves in the litigation.

149. Id. at 576.
150. Id. at 577. Even if the law is unclear, a defendant may rely on it to prove his good faith, and may cite to both statutory and case law. See, e.g., Raffone v. Robinson, 607 F.2d 1056 (2d Cir. 1979); Saffron v. Wilson, 481 F. Supp. 228, 243 (D.D.C. 1979); Bailey v. Lally, 481 F. Supp. 203, 223 (D. Md. 1979); McCormick v. Edwards, 479 F. Supp. 295, 298-99 (M.D. La. 1979).
cials were entitled to assert the good faith defense if the constitutional right they were charged with violating had not been "clearly established" at the time of the alleged violation. The plaintiff in Procunier had charged that prison officials had interfered with his outgoing mail. The Court agreed with the prison officials that the prisoner's first amendment right protecting his mailing privileges was not established at the time of the alleged interference; thus, though a right had been violated, the defendants cannot be said to have acted in bad faith absent a showing of malice.

In extending the qualified immunity allowed state executive officials to federal executive officials in Butz v. Economou, the Court echoed the holding of Procunier. Federal executive officials may not "with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule." The "reasonable knowledge" element serves to protect those officials who make errors in judgment, while precluding maintenance of the Procunier defense where the judiciary, in keeping with its constitutional role, has declared certain rights to be constitutionally protected.

The Court has extended the good faith defense to nearly all possible defendants in a constitutional tort suit. Since the defense is usually a question of fact for the jury, and because juries usually favor the official defendant to the somewhat suspect plaintiff, the practical result of the extension is that very few Bivens...
plaintiffs will recover damages. Two 1980 Court decisions, while not breathing new life into the cause of action, provided some limitations on its usage.

In *Gomez v. Toledo*\(^\text{159}\) the defendant claimed that the burden was on the plaintiff to prove the bad faith of the tortfeasor. The Court rejected the argument, holding that good faith is an affirmative defense that must be pleaded by the defendant. The existence of bad faith need not be alleged in order to state a cause of action under section 1983.\(^\text{160}\) Although the Court's holding refers specifically to section 1983 actions, the reasoning in *Butz* dictates that federal and state officials charged with the same wrongful conduct should be treated similarly. Moreover, it is impractical and unfair to impose on the plaintiff the additional burden of anticipating possible defenses. As the Court pointed out, plaintiffs are unlikely to know in advance which defenses, if any, will be offered.\(^\text{161}\)

An ultimately more significant limitation on the defense was the product of the Court's decision in *Owen v. City of Independence*\(^\text{162}\), where the Court refused to extend it in claims against municipalities. The majority reasoned that only defenses well established at common law should be applied in section 1983 ac-

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There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete, as in the arrest of the wrong person or the search of the wrong house. There is surely serious doubt, for example, that a drug peddler caught packaging his wares will be able to arouse much sympathy in a jury on the ground that the police officer did not announce his identity and purpose fully or because he failed to utter "a few more words".... Jurors may well refuse to penalize a police officer at the behest of a person they believe to be a "criminal" and probably will not punish an officer for honest errors of judgment.

Bivens, 403 U.S. at 421-22 (Burger, C.J., dissenting) (quoting Miller v. United States, 357 U.S. 301, 309 (1958)).

Even those juries finding liability are often reluctant to award high damages. In *Tatum v. Morton*, 386 F. Supp. 1308, 1313-14 (D.D.C. 1974), rev'd in relevant part, 562 F.2d 1279 (D.C. Cir. 1977), a jury awarded only $100.00 to each of two plaintiffs who were unlawfully detained in jail for several hours. Thus, even when the good faith defense does not totally defeat liability, it may influence the award of damages.

159. 446 U.S. 635 (1980).
161. 446 U.S. at 641.
it found no common law justification for according the qualified immunity to cities. Furthermore, the Court found that the policy justifications for allowing the defense were not presented in this case. First, since the award of damages comes from the public treasury and not the individual's own funds, there is no need to worry about the injustice of imposing liability, in the absence of bad faith, on an official who may have had good intentions. Second, imposing liability will not have an inhibiting effect on an official's judgment, since personal liability cannot result. Third, once the threat of personal liability is removed, there is no need to worry that competent people will be discouraged from seeking public office.

The *Owen* Court recognized a problem that exists for all plaintiffs claiming constitutional violations: there is rarely a potential defendant who cannot assert at least a limited immunity. Plaintiffs are often left remediless because the officials succeed in convincing the jury that they acted in good faith. The good faith defense—although warranted in many circumstances—thus stands as an almost impenetrable obstacle for the *Bivens* plaintiff. Yet its complete elimination would likely have a chilling effect on the day-to-day functions of government.

The defense has therefore been attacked from opposing perspectives. At one extreme are those who believe the Court's standard to be too lenient. Justice Stevens, dissenting in

163. Id. at 637-44.
164. Id. at 650. The Court based its decision on two factors. First, Congress abolished municipal sovereign immunity by including cities within the class of "persons" subject to § 1983 liability. Id. at 647-48. Second, although a city was granted a common law immunity for its discretionary decisions regarding public policy issues, a municipality does not have the discretion to violate the Constitution. Id. at 649. Thus, the Court concluded that when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision not to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

165. Id. at 654-56.
166. Id. at 654.
167. Id. at 655-56.
168. Id. at 654 n.38.
169. See, e.g., Theis, "Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights, 59 MINN. L. REV. 991 (1975). The author suggests that *Bivens* distorts the police officer's common law privilege by applying it in the wrong context. The rationale of the good faith defense as presented in *Bivens* is based on a
Procunier, stated that the majority had abandoned the limits of the good faith defense by implying that “every defendant in a 1983 action is entitled to assert a qualified immunity from damage liability.”170 A recent study has suggested that the good faith defense results in very few actual recoveries in Bivens suits, especially against police officers.171 Some commentators have suggested eliminating it altogether and making violators strictly liable for their acts.172

In addition to the argument that the good faith defense favors the defendant, the claim has been made that it is illogical because it “involves nearly circular reasoning that promotes confusion and sometimes defeats meritorious claims.”173 For example, a plaintiff alleging the use of excessive force must, by definition, prove that the officer used more force than was reasonably necessary under the circumstances. Should the jury agree, it would be illogical to then find that the officer reasonably believed that only necessary force was used in making the arrest.174

misconception because the common law “did not allow an officer the luxury of presenting his evaluation of his actions as a defense to a trespass case.” Id. at 1010.


171. See Project, supra note 7, at 781-84. Of 149 cases surveyed, only eight had resulted, by the time of the Project, in victory for the plaintiffs. Id. at 790 table 1. Proposed explanations for the poor results were the juries’ racial prejudice against nonwhite plaintiffs, id. at 794-95, prejudice against plaintiffs with unusual or deviant lifestyles, id. at 796-99, bias in favor of police defendants, id. at 800-02, jury confusion about the good faith defense, id. at 802-06, and bias inherent in the jury selection process that results in mostly white juries, id. at 806-08.

172. See Newman, supra note 7, at 461-62. Judge Newman suggests that the good faith defense should never have been imported into § 1983 or Bivens suits. Since § 1983 was passed by Congress “to provide a remedy for the deprivation of constitutional rights,” common law tort liability and defenses are irrelevant. Id. at 461.

173. Id. at 460.

174. Id. In the Bivens remand Judge Lumbard, in his concurring opinion, suggested that there are two standards of reasonableness. One is reasonableness as it applies to defining probable cause under the fourth amendment and the other is “the less stringent reasonable man standard of the tort action against government agents.” 456 F.2d at 1348-49 (Lumbard, J., concurring). Judge Newman argued that even if there is a difference in these two standards of reasonableness, it will be impossible for a trial judge to “articulate the elusive distinction to the juries,” who will not likely understand the distinction, however artfully explained. Newman, supra note 7, at 461. Therefore, Newman argues, the jurors will be told that

even if the plaintiff proves that an officer lacked probable cause by showing that he could not have had a reasonable belief that the plaintiff had committed a crime, the officer nonetheless has a defense if he acted in good faith and reasonably believed that he did have probable cause.

Id. The jurors will eventually focus on the subjective good faith of the officer—the
On the other hand, the good faith defense has been criticized as an onerous burden on the defendant. In his dissenting opinion in *Butz*, Justice Rehnquist characterized the majority opinion as holding that "anytime a plaintiff can paint his grievance in constitutional colors, the official is subject to damages unless he can prove he acted in good faith." Such a defense requires the "consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits." Justice Rehnquist also feared that limitation of executive immunity will disrupt the government by allowing an increase in litigation that will harass government officials. Although absolute immunity would result in "an occasional failure to redress a claim of official wrongdoing," that would be the "lesser evil than the impairment of the ability of responsible public officials to govern."

The sharp difference of opinion here illustrates the great debate over the good faith defense. While elimination of the defense is a theoretical possibility, even the *Bivens* Court alluded to the potential need for some defenses to the action and remanded to the Second Circuit on this issue. Nonetheless, the state of the law is unfair to the aggrieved plaintiff, who is often left remediless because of the good faith defense or other immunities. The result directly contradicts the purpose of *Bivens* itself.

C. *In Search of a Solution: Respondeat Superior and the Problem of Sovereign Immunity*

There may be no perfect solution to the problems raised by the good faith defense, but allowing a plaintiff to sue the employing municipal, state, or federal agency on a respondeat superior theory would be a step in the right direction. Such a proce-
dure would assure the successful plaintiff of a solvent defendant while protecting the official who has acted in good faith.

Respondeat superior is allowed in most areas of tort law. The general principle is that the employer should bear the cost of torts committed by employees acting within the scope of their employment. The theory behind the vicarious liability of the employer is that the employee is engaged in the enterprise for the employer's benefit, who must therefore accept any loss resulting from the employee's conduct as a cost of doing business. It was also recognized at common law that the employer was better able to bear the cost of liability than was the employee, and could avoid future losses by carefully selecting competent employees. Respondeat superior represents a method of risk allocation that places the burden of tort liability on the party best able to absorb it. An employer can distribute this cost of doing business by adjusting prices or procuring liability insurance. Thus the community at large, rather than the salaried employee or the innocent plaintiff, ultimately absorbs the costs of torts.

These same principles should apply to a constitutional tort claim. The United States as the ultimate employer of all federal officials should bear the cost of the injuries inflicted by its employees. Although taxpayers would ultimately pay for constitutional torts of city, state, and federal officials, they are the beneficiaries of government services and should absorb the loss as one of the costs of government. In a representative democracy, the people cede to the government the responsibility for conducting certain public af-


185. See COMMITTEE ON FEDERAL LEGISLATION, supra note 23, at 15-16.


187. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.9, at 1389-90 (1956); see James, Vicarious Liability, 28 TUL. L. REV. 161 (1954). In general, in order for an employee's activity to be considered within the scope of employment, the act must take place during the ordinary time and at the usual location of employment for the purpose of carrying out the employer's business. If all three criteria are met, the employer will be liable for the employee's tort. See RESTATEMENT (SECOND) OF AGENCY §§ 233-236 (1958).

188. W. PROSSER, supra note 186, § 69, at 459.

189. Id.
fairs. Where a good faith error results in injury to an individual, the “fault” lies not with any one person, but with the system itself. Thus placement of the “costs of doing business” on any one person—be it the innocent official or the innocent plaintiff—represents a tyranny of the majority. James Madison foresaw this very possibility, writing that “the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.”

The second of Bivens’ twin goals—deterrence—would also best be served by allowing vicarious liability. There is no logical reason to distinguish between common law torts and constitutional torts on the issue of vicarious liability. Allowing respondeat superior, however, raises problems of sovereign immunity, which will be discussed in separate subsections on cities, states, and the United States.

1. Municipal Immunity.—In Monroe v. Pape the Supreme Court held that cities were not “persons” for purposes of section 1983 damage actions and were thus absolutely immune to suit. The Court eventually overruled this part of the Monroe decision in Monell v. Department of Social Services and held that cities were persons under section 1983, but reserved the question of what, if any, limited immunity the city would be allowed. Resolving a conflict among the circuits on this issue, the Owen Court held that a city could not offer the good faith of its officials as a defense to damages. Since the city officials involved were entitled to the defense of good faith, “many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense.” In holding the city strictly liable, the Court reasoned that “it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights . . . have been violated.”

190. 5 THE WRITINGS OF JAMES MADISON 269 (G. Hunt ed. 1904).
191. See Newman, supra note 7, at 457.
194. Id. at 701.
196. Id. at 651.
197. Id. at 655. (citations omitted).
"[d]octrines of tort law have changed significantly . . . and our notions of governmental responsibility should properly reflect that evolution. No longer is individual ‘blameworthiness’ the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." 198

The Court’s focus on “equitable loss-spreading” is a significant development in the area of constitutional litigation. Proper attention is given to the important question of who is best able to bear the cost of official misconduct. A balancing test weighing the interest of the individual in redressing his injury and the public interest in effective government is echoed in the Court’s conclusion:

The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the cost of injury inflicted by the “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.” 199

The majority’s reliance on the desirability of equitable loss-spreading was a crucial factor in its decision to hold the city liable for the section 1983 violations of its employees. The belief that the public should pay for official misconduct was not, however, shared by all members of the Court. In a sharp dissenting opinion, Justice Powell stated that “many local governments lack the resources to withstand substantial unanticipated liability under § 1983.” 200 While Justice Powell’s concern for the financial solvency of cities is well-taken, it is also true that the city is in a better position to avoid the loss by procuring liability insurance 201 than the innocent victim of official wrongdoing.

198.  Id. at 657.
199.  Id. (quoting Monell, 436 U.S. at 694).
200.  Id. at 670 (Powell, J., dissenting).
201.  Procuring liability insurance may not be as easy as it seems, for some municipalities have been unable to procure insurance or have acquired it only at a very high price. The burden is particularly great for small towns that have limited treasuries. One major recovery by a plaintiff in a constitutional tort suit could bankrupt an entire town. The money that a small town may have to set aside for liability insurance may divert funds from municipal services. For a discussion of this problem, see Transcript, CBS Reports, “See You in Court” 6-16 (July 9, 1980) (copy on file in office of Hofstra Law Review).
The Owen Court cited Monell's holding that a city can be held liable only when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." The Monell Court concluded that a city would be liable for constitutional violations resulting from a city custom even if such a custom has not been officially sanctioned by the city's official decisionmaking channels. However, that Court specifically rejected municipal liability based solely on a respondeat superior theory. The Court reasoned that the language of section 1983 specifically requires a causal connection between the city's activity and the injury before liability could be imposed. Thus a city is not liable just because it employs a wrongdoer. Most courts have also refused to allow respondeat superior actions against a city in a Bivens suit based on the fourteenth amendment.

Yet the reasoning in Owen outlined above is equally applicable whether or not the constitutional violation can be tied to a policy or custom of the municipality. The policy of equitable risk-spreading serves to allocate costs and should not be limited only to cases where a policy or custom of the city has "caused" the constitutional violation. A plaintiff in City A would recover if he could prove that his unlawful arrest was caused by a city policy, while a

205. 436 U.S. at 690.
206. Although the Supreme Court has not yet addressed the issue of respondeat superior in a Bivens suit against a city based on the fourteenth amendment, various courts of appeals have held that vicarious liability does not apply in a Bivens suit. E.g., Jones v. City of Memphis, 586 F.2d 622, 623-25 (6th Cir. 1978) (incongruous to allow respondeat superior in action based directly on fourteenth amendment and not allow it in § 1983 suit against same city). Most courts hold that a city will be held liable only when a policy or custom causes the injury. See, e.g., Turpin v. Mailet, 579 F.2d 152, 164 (2d Cir.) (en banc), vacated and remanded on other grounds sub nom. City of West Haven v. Turpin, 439 U.S. 974 (1978); Molina v. Richardson, 578 F.2d 846, 847-48 (9th Cir.), cert. denied, 439 U.S. 1024 (1978); Nix v. Sweeney, 575 F.2d 998, 1003 (8th Cir. 1978); Jamison v. McCurrie, 565 F.2d 483 (7th Cir. 1977); Kostka v. Hogg, 560 F.2d 37, 43-44 (1st Cir. 1977); McDonald v. Illinois, 557 F.2d 596, 600-01 (7th Cir.), cert. denied, 434 U.S. 872 (1977); Kedra v. City of Philadelphia, 454 F. Supp. 652, 676-77 (E.D. Pa. 1978).

207. The Monell Court interpreted the language of § 1983 as requiring a causal relationship between the defendant's acts and the plaintiff's injuries. 436 U.S. at 692. Furthermore, the Court found support for its interpretation of the statutory language in the legislative history of § 1983. Id. at 692 n.57. For a contrary interpretation of the legislative history, see Comment, supra note 183, at 526-36.
plaintiff in City B would fail if he could not point to any such city policy. Recovery should not depend on such fine distinctions.

There is no reason the restrictions imposed on respondeat superior in section 1983 actions should be imposed on a *Bivens* action against a city based directly on the fourteenth amendment. The Court's decision in *Monell* was based on a reading of section 1983 requiring a causal connection between the defendant-city's act and the injury before liability could be imposed. Moreover, the Court examined section 1983's legislative history and concluded that Congress did not intend to impose vicarious liability on cities. The *Bivens* cause of action should not be burdened by the legislative history of section 1983. The *Bivens* remand suggests that only individual officials should be entitled to some form of immunity. Moreover, the action was created to assure that plaintiffs not be left without a remedy. This goal can be reached only if units of government are liable for the constitutional violations of employees regardless of whether the injury was caused by a municipal policy or custom.

The dual objectives of section 1983 and *Bivens* suits—deterring official misconduct and compensating the victim—would be reached more frequently if respondeat superior actions were allowed. The plaintiff's chance of winning a civil rights action decreases when the defendant is a police officer. Juries are fre-

208. This creates substantial problems in line-drawing when determining which constitutional injuries are the result of an official policy or custom. See 436 U.S. at 713 (Powell, J., concurring). Furthermore, the language of § 1983 need not be read so narrowly. The argument has been made that the statute allows for respondeat superior, since "[a]n official's acts are those of the municipal employer; the acts 'caused' by the official, so long as they fall within the scope of employment, are 'caused' by the municipality." Note, *supra* note 183, at 917.

209. The argument has been made that the restrictive interpretation given respondeat superior in § 1983 actions will encourage many plaintiffs to sue a city in a *Bivens* suit based directly on the fourteenth amendment. Note, *supra* note 183, at 550. *But see* Turpin v. Mailet, 591 F.2d 426, 427 (2d Cir. 1979).

210. 436 U.S. at 692.

211. The Court relied on congressional debate leading to the rejection of the Sherman Amendment, which was viewed by its proponents "as a form of vicarious liability for the unlawful acts of the citizens of the locality." 436 U.S. at 692 n.57. Since Congress rejected this amendment and failed to use specific statutory language creating vicarious liability in § 1983, the Court felt that the inference was quite strong that Congress did not intend to impose respondeat superior liability on cities. *Id. But see* Note, *supra* note 183, at 910-15.

212. 456 F.2d 1339 (2d Cir. 1972).

213. *Bivens*, 403 U.S. at 397.


quently sympathetic to the plight of the police officer who must pay for a supposed error in judgment out of his or her own paycheck.\textsuperscript{216} Even if the plaintiff wins, the officer is sometimes judgment proof.\textsuperscript{217} Allowing respondeat superior actions not only would assure a deserving plaintiff of compensation, but also would “enhance the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence.”\textsuperscript{218} If the appropriate employing agency—whether city, state, or federal—is liable for the constitutional violations of its employees, there would likely be greater monitoring of the employees’ future actions to achieve conformity with constitutional requirements.\textsuperscript{219}

2. State Immunity and the Eleventh Amendment.—The eleventh amendment to the Constitution, though not so indicating on its face,\textsuperscript{220} has long been interpreted to bar suits by citizens of a state against that state.\textsuperscript{221} By section five of the fourteenth amendment, Congress is empowered to abolish a state’s immunity.\textsuperscript{222} Because section 1983 has been interpreted, on the basis of its legislative history, to allow suits against units of local government (which are the creation of state governments),\textsuperscript{223} one might conclude that states are likewise subject to suit. However, in spite of compelling evidence that Congress intended a waiver of state immunity when enacting section 1983,\textsuperscript{224} a majority of the present Court have refused to allow the extension.\textsuperscript{225} Bivens plaintiffs seeking damages against a state government are unlikely to circumvent the Court’s roadblock, since only Congress—and not the judiciary—can enact a waiver of the eleventh amendment immunity.\textsuperscript{226}

To speak of Bivens suits arising from unconstitutional state conduct is therefore to speak of an unreality. With a variety of im-

\begin{itemize}
    \item \textsuperscript{216} Newman, supra note 7, at 456.
    \item \textsuperscript{217} Id.
    \item \textsuperscript{218} Id. at 457.
    \item \textsuperscript{219} Id.
    \item \textsuperscript{220} The eleventh amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend XI.
    \item \textsuperscript{221} Hans v. Louisiana, 134 U.S. 1 (1890).
    \item \textsuperscript{222} Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
    \item \textsuperscript{223} Monell v. Department of Social Servs., 436 U.S. 658 (1979).
    \item \textsuperscript{225} Id. at 342-45; Edelman v. Jordan, 415 U.S. 651, 675-78 (1974).
    \item \textsuperscript{226} Fitzpatrick v. Bitzer, 427 U.S. at 456.
\end{itemize}
munities and defenses, the likelihood of sympathetic juries, and the potential of insolvent defendants, actions against state officials are unlikely to bear fruit. The same policies underlying equitable risk-spreading which support the creation of respondeat superior suits against municipalities, likewise support the creation by Congress of similar actions against state governments. As Justice Brennan indicated in *Quern v. Jordan*, only Congress can remove the shackles of immunity imposed by the courts on those suing states.

3. The Immunity of the United States.—Sovereign immunity as it applies to the United States is an outmoded concept with its origin in the belief that the “King can do no wrong.” It was considered absurd for the King to be sued in his own court or to send a writ to himself commanding his own presence in the King’s court. The monarch was looked upon with too much favor and reverence to be subject to the same laws as ordinary persons. But in the United States the people are sovereign. The right of the people should not yield to the sentiment of loyalty to the sovereign person of the monarch. A citizen’s rights secured under the Constitution of the United States should yield to no one. Congress has waived the sovereign immunity of the United States in other contexts and should do so for the violation of constitutional rights by federal employees. The individual should not have to suffer official wrongdoing without redress just because the tortfeasors acted in good faith and the United States will not take responsibility for the actions of its employees.

One hundred and sixty years have passed since the Supreme Court announced that no suit could be prosecuted against the United States without the government’s consent. Nothing in the

228. Id. at 366 (Brennan, J., concurring in the judgment, joined by Marshall, J.).
232. Id. at 208.
233. Id.
Constitution supports the antiquated doctrine of sovereign immunity. Reason dictates that since the cities are now liable for constitutional violations as determined by the Court in *Monell* and *Owen*, the United States should also be responsible for the unconstitutional activities of its employees. The Court’s decisions in these cases clearly focus on the principle of risk allocation. Individual fault is no longer the primary test for liability. It therefore seems logical that the “feudal and monarchistic doctrine” of sovereign immunity should be abandoned by act of Congress and replaced by a policy of governmental responsibility. Financial loss is best borne by all the taxpayers than by an individual officer—or by the injured plaintiff.

D. A Proposal for Reform

Chief Justice Burger, dissenting in *Bivens*, made a suggestion for reform in the context of fourth amendment violations: “Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of *respondeat superior* in our tort law provides an entirely appropriate conceptual basis for this remedy.” The Chief Justice pointed out that if a person were illegally searched by a department-store security guard, the obvious remedy would be an action against the department store for damages based on a *respondeat superior* theory. The same reasoning should apply to an illegal search by an FBI agent: The plaintiff is at least equally injured in either case—but a successful defense of good faith by the FBI agent would leave the victim of that search without a remedy. Chief Justice Burger also suggested that “the record of the police conduct that is condemned, could undoubtedly become a relevant part of an officer’s personnel file so that the need for additional training or disciplinary action would be identified or his future usefulness as a public official evaluated.” This would provide for the second goal of a *Bivens* suit—deterrence of the unlawful behavior.

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236. 403 U.S. at 422 (Burger, C.J., dissenting).
237. *Id.* (Burger, C.J., dissenting).
238. *Id.* at 423 (Burger, C.J., dissenting).
239. Three years after Chief Justice Burger’s remarks, Congress amended the
Similar proposals have been introduced in the Senate\textsuperscript{240} and in the House of Representatives.\textsuperscript{241} Judge Newman of the Second Circuit has also proposed a statute that would be modeled on section 1983.\textsuperscript{242} Recently, the Committee on Federal Legislation of

\textsuperscript{240} In introducing one such bill, S. 695, 96th Cong., 1st Sess., 125 \textsc{Cong. Rec.} S2919 (daily ed. March 15, 1979), Senator Edward Kennedy stated:

The current system for compensating citizens deprived of their constitutional rights by Federal officials is inadequate from the perspective of the person injured by the unconstitutional conduct of a Federal employee, from the perspective of the vast majority of Federal employees who carry out their duties diligently and in good faith, and from the perspective of the Federal Government.

\textit{Id.} (remarks of Sen. Kennedy). The Senator pointed out that because of sovereign immunity, a plaintiff's only present remedy is to sue the individual federal officers. The proceedings are long, expensive, and rarely successful since the good faith defense results in few actual recoveries. The employee who has acted in good faith fares no better under the present system since he or she faces "the spectre of financial ruin, the anxiety, and the damage to reputation which are inherent in any lawsuit which is, in essence, attacking his personal integrity." \textit{Id.} (remarks of Sen. Kennedy). The threat of potential liability discourages employees from doing their jobs "vigorously and courageously." \textit{Id.} (remarks of Sen. Kennedy). Lastly, the United States Government also loses because it foots the bill for supplying federal officials sued in their personal capacities with private attorneys—at a cost of $2,000,000 thus far. \textit{Id.} (remarks of Sen. Kennedy). Private counsel fees cost the United States $554,306 for fiscal year 1976; $448,520 for 1977; $757,248 for 1978; and $371,119 for the first part of 1979 (as of March 21, 1979). \textit{Amendment of the Federal Tort Claims Act: Hearings on H.R. 2659 Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 13 (1979).}


\textsuperscript{242} The proposed statute reads as follows:

The employing department or unit of government of [e]very person who, under color of any statute, ordinance, regulation, custom, or usage of the United States or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. The United States shall be entitled to intervene in any such action on behalf of the plaintiff or to bring such action on behalf of the party injured. In any suit brought pursuant to this statute, immunities and defenses available at common law, including the defense of good faith, are abolished. To establish liability, the plaintiff need establish by a preponderance of the evidence only
the Association of the Bar of the City of New York suggested that federal sovereign immunity be waived and that plaintiffs be allowed to sue both the United States and the individual official, with recovery against the employee allowable only if the plaintiff establishes that the employee's acts were the result of willfulness or malicious intent. The government would not be allowed to assert the good faith of its employee as a defense. Thus, if an official acted in good faith, recovery would be allowed only against the United States. That the official performed a discretionary function would also be irrelevant. Thus an injured party would be assured of a remedy, while "innovative and courageous employee conduct" would be encouraged, and employees "lawfully exercising their functions" would be protected.

The proposal offered by the committee would force the plaintiff to plead and prove the bad faith of the defendant in order to recover from him. It would be more equitable, given the relative availability of information, for the defendant-official to plead and prove his or her own good faith. Once the good faith of the defendant is established, he or she would not be liable; the United States would then be strictly liable for the official's unconstitutional acts. If the defendant cannot establish his or her own good faith, then recovery would be allowed only against the official and not against the United States. This seems to be an adequate solution to the problem of striking a balance between the rights of the injured and the rights of federal officials. Prohibiting the United States from pleading the good faith of its employees as a defense will provide the plaintiff with a more certain remedy. This waiver of sovereign immunity and approval of respondeat superior actions will protect the employee who made a bona fide error in judgment by putting the ultimate responsibility for official wrongdoing on the entity most able to pay—the government employer.

that the adverse action was taken against the party injured; liability can be defeated when the defendant establishes by a preponderance of the evidence that the adverse action taken against the party injured was lawful. Whenever a verdict is returned in favor of the party injured in a suit under this statute, the Court shall award, in addition to compensatory damages determined by the trier of fact, a sum of $____ as liquidated damages for the denial of a federally protected right.

Newman, supra note 7, at 467 n.72. (emphasis omitted).

243. COMMITTEE ON FEDERAL LEGISLATION, supra note 23, at 4.
244. Id. at 15.
245. Id.
246. Id. at 24.
VI. Damages

The law controlling the measurement of damages in Bivens actions is far from settled, with courts allowing divergent awards based on a myriad of policy considerations. The Supreme Court addressed a related issue in the section 1983 context in Carey v. Piphus,1 yet directed itself only to damages arising from violations of procedural due process.2 Subsequently, the lower courts have applied Carey, sometimes indiscriminately, to Bivens actions encompassing the violation of substantive rights, without attempting to tailor their decisions to the particular infringement at issue.3 Thus, the law remains in a state of flux.

This section will examine damage awards in both Bivens and section 1983 cases with an eye toward the establishment and justification of a clear and concise framework within which the damage issue can be considered. It has been recognized that "a Bivens-type cause of action is the federal counterpart to claims under 42 U.S.C. § 1983 [and] that standards for determining injuries developed in § 1983 litigation are applicable in this context."4 Section 1983 cases provide a body of case law easily, though not always profitably, guiding decisions in the Bivens context. Accordingly, they will be considered throughout this section.

The measurement of damages in even the most simple tort cases can prove to be difficult.5 The presence of complex constitutional questions further confuses the issue in Bivens actions. Accordingly, a framework consisting of four injury categories is offered here to facilitate clear analysis. The first category (type I) includes damages intended to compensate plaintiffs for actual, tangible injury—for example, the costs attendant to the destruction of property in the course of an illegal search. Type II covers damages for intangible but provable injury and includes, for example, psychological pain and suffering. The third category (type III) covers damages designed to compensate plaintiffs for injuries inherent in the violation of a constitutional right though not separately subsumed in either the first or second category. The premise for creating the third category is that feelings of injustice, individual

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2. Id. at 266-67.
3. See cases cited note 62 infra.
4. Paton v. LaPrade, 524 F.2d 862, 871 (3d Cir. 1975); see Green v. Carlson, 581 F.2d 669, 673 (7th Cir. 1978), aff'd, 446 U.S. 14 (1980).
indignity, humiliation, and outrage resulting from constitutional violations are inherently worthy of compensation and that such damages serve to protect the system itself, apart from deterring future action against individuals. Type-IV damages are punitive in nature, designed to deter future similar conduct. The discussion will focus primarily on type-III claims as these raise questions unique to constitutional tort cases which are largely unsettled.

A. The Inherent Value of Constitutional Rights: A Process Argument

The 1960's saw a rapid increase in the number of constitutional tort suits largely as a result of the Supreme Court's decision in *Monroe v. Pape*. As the cause of action developed, courts consistently acknowledged the intrinsic importance of constitutional rights. Yet absent proof of actual injury, the courts frequently undercut that premise by allowing only nominal damages.

While arguments for the monetary redress of constitutional violations are easily stated in terms of compensation and deterrence, the rationale for redressing such violations on a separate ground is less frequently acknowledged. The temptation to allow type-III damages on substantive grounds is significant: As the argument develops, the individual indignity consequent to the knowledge that one was deprived his or her constitutional rights leads to personal humiliation, or pain and suffering. That reasoning, however, fails on its own terms. To the extent that type-III damages would exist solely for compensatory purposes, they are clearly subsumed in the type-II classification.

The proper rationale lies not in substance, but in process. The spectre of a government official depriving one of rights secured by the Constitution is clearly outside the concept of due process. As the Supreme Court recognized in *Goss v. Lopez*, the "Due Process Clause also forbids arbitrary deprivations of liberty. Where a person's good name, reputation, honor, or integrity is at stake be-

6. These concepts are developed more completely at text accompanying notes 7-20 infra.
cause of what the government is doing to him' the minimal requirements of the Clause must be satisfied." Still, though due process is violated, how can damages be justified absent proof of injury? It is here that the arguments for process values extend beyond judicial process to legal process in general. Three process values, equality, dignity, and participation, are implicated in the constitutional tort context.

The equality value has generally been recognized as militating in favor of "equal access and equal opportunity to influence the decisionmaker." However, the value is most significant to the extent it "generates public confidence and respect for law." Thus, just as the equality value is maligned by insufficient judicial process, it is maligned by other types of inadequate legal process including, for example, the failure to obtain a valid warrant consequent to a fourth amendment search. Moreover, the absence of actual damages is irrelevant: Once an individual is singled out for treatment not otherwise accorded all citizens, injury has occurred.

The second value, the dignity value, "accords individuals respect and promotes their grounds for self-respect, thus militating against alienating and degrading procedures." The dignity value is distinguishable from the equality value in that its roots lie primarily in the recognition that, even absent unfair treatment relative to the rest of society, "the elementary idea that to be a person, rather than a thing," is violated by insufficient legal process. Whether or not one's neighbors' homes are searched illegally cannot logically eliminate the separate standing of the dignity value.

The third process value, the participation value, relates to one's feelings relative to government control of the particular legal process at issue. Among the three values discussed here, the participation value is most closely connected to the revolutionary era idea that "power wielded without accountability to those on whom it focuses" is the "antithesis" of good government. Thus, the

11. Id. at 574 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).
15. Taub, supra note 13, at 121.
17. Id.
18. Id.
fourth amendment's requirement that warrants be issued by a neutral magistrate only on a showing of probable cause\textsuperscript{19} can be seen as an effort to provide individuals with an indirect role in the decisionmaking process. When the government ignores the system, it violates individual rights of participation, engendering injury even absent damage to the equality and dignity values.

The process-based justification for monetary redress cannot properly be viewed as compensatory since it goes beyond any empirical measurement of actual injury. It cannot be categorized as purely deterrence-based, since it serves some remedial function. It seems best viewed as organic. Organicism suggests "that life and living processes are the manifestation of an activity possible only in virtue of the state of autonomous organization of the system rather than because of its individual components."\textsuperscript{20} Our constitutional system, befitting a nation of laws and not individuals, requires for its proper and continuous functioning a built-in method of protection that serves its broader purpose of self-effectuation while at the same time allowing appropriate regard for its individual parts. Organic damages, then, foster the ideal of perpetual constitutional government even while meeting the needs of its day-to-day beneficiaries. Type-III damages protect each individual mechanism in the system, yet also serve to protect the system as a whole even apart from the particular mechanism at issue.

B. Cases Prior to Carey v. Piphus

Decisions of the federal courts regarding damages in a constitutional tort context were marked with indecisiveness and contradiction prior to the Carey decision. While the courts frequently acknowledged the inherent importance of constitutional rights, many belied this basic belief by allowing only nominal compensatory damages unless the plaintiff proved actual injury.\textsuperscript{21} Conversely, other courts have granted substantial monetary awards to plaintiffs proving only a violation of their constitutional rights and no actual injury.\textsuperscript{22} These awards have been based on the premise that constitutional rights are of such fundamental importance to American so-

\textsuperscript{20} WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1590 (1971).
ciety that their infringement alone, even absent proof of actual injury, merits substantial compensation.

In United States ex rel. Motley v. Rundle, the plaintiff, a black prisoner at a state correctional institution, had been working at a 69¢-a-day prison job when he was temporarily transferred to another institution pending a habeas corpus hearing. Upon returning to the original institution, he was demoted to a 15¢-a-day position. White inmates forced to leave the institution temporarily had maintained their jobs and salaries upon their return. The plaintiff brought suit against the prison superintendent under section 1983, claiming an equal protection violation. The trial court, in finding for the plaintiff, held that “the constitutional rights of a citizen are so valuable to him that an injury is presumed to flow from the deprivation itself.” The court believed that hurt feelings, outrage, and humiliation are the natural consequences of unconstitutional conduct by government officials. These type-III injuries, however, were found to be worthy of only nominal compensatory damages. Similarly, in Basista v. Weir, also arising under section 1983, the Third Circuit held that only “nominal damages are proved by proof of deprivation of a right to which the plaintiff was entitled.”

Conversely, in Sexton v. Gibbs, the plaintiff was granted substantial damages in a section 1983 suit for the violation of his constitutional rights, even though he did not claim actual injury in any specified amount. The violations alleged arose from an unconstitutional search by police officers of the plaintiff’s automobile. The court, in granting $750 damages, stated that “there is

24. Id. at 808-09.
25. Id. at 811.
26. Id.
27. Although the court specified that it was awarding a nominal amount for type-III injury, it did not make it clear what that amount was. The court only noted that “nominal damages may be awarded for these natural consequences of lawless action by state officials,” id., in granting a lump sum for actual proven injury. Id. at 810-11. The Supreme Court equated nominal damages with an award “not to exceed one dollar” in Carey v. Piphus, 435 U.S. 247, 267 (1978) (violation of procedural due process). See text accompanying notes 37-60 infra.
29. 340 F.2d at 87.
31. Id. at 136, 142-43.
32. Id. at 137.
no doubt that the plaintiff suffered humiliation, embarrassment and discomfort in addition to being deprived of his federally protected rights . . . . "

In *Tatum v. Morton*, a group of individuals was unlawfully arrested while participating in a peaceful demonstration outside the White House. The protesters brought suit, based on *Bivens*, against the police, federal officials, and the District of Columbia, alleging, *inter alia*, the violation of their first amendment rights. The District of Columbia Circuit, in holding that the trial court took too limited a view regarding damages, stated:

The vindication of these rights warrants more than token acknowledgement . . . . Compensation for denial of First Amendment rights should not be extravagant . . . . Correspondingly such a compensation award should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right to demonstrate.

The court thus recognized the inherent value of constitutional rights in the case of a right the very nature of which might otherwise be said to defy valuation.

*Motley, Basista, Sexton*, and *Tatum* provide a representative view of the state of the law prior to *Carey* regarding the valuation of constitutional rights. In juxtaposition, the decisions present an apparent contradiction: The same rights which are held to be so precious that injury is presumed to flow from the deprivation itself often are found to be worthy of only nominal damages.

**C. Carey v. Piphus**

*Carey v. Piphus* presented two cases consolidated at the trial level. In the first case, the plaintiff was suspended from school by the assistant principal for the alleged use of marijuana. In the

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33. *Id.* at 143.
35. Plaintiffs had sought $10,000 in compensatory damages per plaintiff, per violation, and were awarded a total of only $100 per plaintiff. 386 F. Supp. at 1311-14.
36. 562 F.2d at 1282.
second case, the plaintiff was suspended for violating a school rule prohibiting the wearing of earrings by male students. The plaintiffs filed section 1983 suits against the school officials in federal district court, arguing that they had been suspended without due process of law in violation of the fourteenth amendment. The district court upheld plaintiff's claims on the merits but declined to award damages in light of the lack of evidence of actual injury. The court believed that any award allowed would be speculative.

The Court of Appeals for the Seventh Circuit reversed and remanded on the damage issue. The court believed that compensatory damages are recoverable for a violation of procedural due process, as they would be for the deprivation of voting rights or other constitutional rights. Even absent proof that the suspensions were unjustified or that pecuniary loss had resulted consequent to the procedural denial, the court held that damages should be granted solely "for the injury which is inherent in the nature of the wrong." As to valuation, the court instructed the district court that the amount fixed on remand "should be neither so small as to trivialize the right nor so large as to provide a windfall." The Seventh Circuit, like the D.C. Circuit in *Tatum v. Morton*, was determined to protect the integrity of constitutional rights by recognizing a special category of damages.

The Supreme Court, in a unanimous opinion, reversed. Justice Powell, writing for the Court, asserted that section 1983 required proof of actual injury if recovery was to be allowed. He then suggested courts adopt a flexible position regarding damages in order to further the purpose of section 1983, and rejected strict reliance on common law tort models for valuing injury in constitu-

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41. Nos. 73-C-2522, 74-C-303, reprinted in Petitioners' Brief for Certiorari app., at A5-9.
42. Id., reprinted in Petitioners' Brief for Certiorari app., at A13-14.
43. Carey v. Phiphus, 545 F.2d 30 (7th Cir. 1976).
44. Id. at 31 (citing Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975) (controlling availability of damages), cert. denied, 425 U.S. 953 (1976)).
45. Id. (quoting Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d at 580).
46. Id. at 32 (footnote omitted).
47. 562 F.2d 1279 (D.C. Cir. 1979); see text accompanying notes 34-36 supra.
49. Id. at 254-57.
tional tort cases. Thus, "rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question . . . ."50 In spite of the reference to protected interests, however, the Court equated compensable injury in the procedural due process context with emotional suffering:

In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.51

The Court's joint focus on protected interests and provable emotional injury is inherently contradictory. If, as the Court suggests, there is little likelihood of emotional injury, thus pretermittting the question of compensation, due process interests intended to be protected may be violated with impunity. At the same time, the Court invites boilerplate proof of emotional distress by stating that "we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself."52 And the Court's belief that "a person may not even know that procedures were defective until he enlists the aid of counsel to challenge a perceived substantive deprivation"53 is unavailing. The appropriate question—even in the Court's analysis—is whether compensable injury occurs, not how the plaintiff becomes aware of its legal consequences. The distinction of defamation per se in this context54 is unconvincing. As with constitutional violations, defamation plaintiffs may not know the legal ramifications of a libel or slander—or even of its existence—until apprised by a third party.

Beyond the unsound analytical foundation of the Carey opinion rests a disconcerting valuation of procedural rights. The Court, having required proof of actual injury, next addressed the availability of nominal damages.55 In affirming their availability even where valuation is problematic, the Court recognized that "[b]y making

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50. Id. at 259 (emphasis added).
51. Id. at 264.
52. Id. at 263.
53. Id. (emphasis in original).
54. Id. at 282-63.
55. Id. at 266-67.
the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . .”

Based on this, and on a recognition that procedural due process “does not depend on the merits of a claimant’s substantive assertions,” the Court held that the claimants were “entitled to recover nominal damages not to exceed one dollar . . . .” Even assuming that plaintiffs will be predisposed to bring suits enforcing procedural due process guarantees with the prospect of recovering only one dollar, it is difficult to conceive of government officials tailoring their procedural decisions in light of the threatened liability, so defined. Given the complexities of procedural due process, a stronger admonition from the judiciary seems necessary if “organized society” is to organize along constitutional lines.

D. Toward a Post-Carey Model

Since the Carey decision, trial courts have granted only nominal damages for the violation of procedural due process absent proof of actual injury. Some courts also have extended Carey, holding that violations of substantive constitutional rights are compensable with only nominal damages absent proof of individualized injury. An automatic extension, however, is unwarranted in light of the specificity of the Carey Court’s reason for granting certio-

56. Id. at 266.
57. Id.
58. Id. at 267 (emphasis added). The Court noted that the recovery of nominal damages would depend on a finding by the district court on remand that petitioners’ suspensions were justified. Id. Presumably, were the suspensions unjustified, the question of valuing substantive rights would have arisen. The Court also stated that “substantial damages should be awarded . . . in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.” Id. at 266.
60. 435 U.S. at 266.
62. E.g., Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) (first amendment violation); Davis v. Village Park II Realty Co., 578 F.2d 461 (2d Cir. 1978) (first amendment violation).
rari\textsuperscript{63} and its ultimate holding.\textsuperscript{64} That decision warned against simplistic consistency in the valuation of constitutional rights:

\begin{quote}
[T]he elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. As we have said . . . these issues must be considered with reference to the \textit{nature of the interests} protected by the particular constitutional right in question.\textsuperscript{65}
\end{quote}

The Bill of Rights was, of course, intended to protect interests not necessarily apparent on the face of the amendments.\textsuperscript{66} Accordingly, each constitutional violation must be examined separately, with strict attention paid to its individual nature and the interests abused before any damage formula can be found applicable.

At least one court has acknowledged the inapplicability of Carey's procedural due process holding to the violation of other constitutional rights. In \textit{Halperin v. Kissinger},\textsuperscript{67} a former member of the National Security Council Staff alleged that his home telephone had been illegally wiretapped. Ten former federal officials, including Richard Nixon, John Mitchell, Henry Kissinger, and H.R. Haldeman,\textsuperscript{68} were sued, in part on a \textit{Bivens} theory.\textsuperscript{69} The District Court for the District of Columbia held, as to damages, "that there is no demonstrable injury here [and] plaintiffs are not entitled to an award of compensatory damages. . . . It is evident, therefore, that the only pecuniary relief available to plaintiffs is nominal damages in the amount of One Dollar."\textsuperscript{70}

The District of Columbia Circuit reversed, finding that "[e]ven

\textsuperscript{63} "We granted certiorari [430 U.S. 964 (1977)] to consider whether, in an action under \S 1983 for the deprivation of \textit{procedural due process}, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages." 435 U.S. at 253 (emphasis added).

\textsuperscript{64} "[T]he denial of \textit{procedural due process} should be actionable for nominal damages without proof of actual injury." 435 U.S. at 266 (emphasis added) (footnote omitted).

\textsuperscript{65} \textit{Id.} at 264-65 (emphasis added).


\textsuperscript{68} 424 F. Supp. at 840.

\textsuperscript{69} 434 F. Supp. at 1195.

\textsuperscript{70} \textit{Id.}
if a constitutional violation inflicts only intangible injury, compensation is still appropriate.\textsuperscript{71} Injury including "'stigmatization, invasion of privacy, interference with personality development, and interference with . . . freedom of association'"\textsuperscript{72} would merit reasonable compensation. Moreover, the showing might be made "through direct testimony of the plaintiffs or might be 'inferred from the circumstances' . . . ."\textsuperscript{73}

The Court of Appeals' decision provides a general framework within which the decision to allow damage awards can be considered. The court carefully distinguished the Supreme Court's \textit{Carey} opinion, stating that "[t]he substantive rights asserted by the Halperins are of a much different character . . . ."\textsuperscript{74} In focusing on the interests protected by the constitutional provisions at issue instead of the presence or absence of actual injury, the court was able to consider, albeit implicitly, the morphogenesis of protection afforded interests in personal liberty and privacy.\textsuperscript{75} Indeed, the opinion fairly implies that the inadequacy of the common law tort model necessitated special constitutional protection.\textsuperscript{76} Thus, the first step of the court's analysis—an inquiry into protected interests—allows the second step—an inference that the existence of special protection presumes the presence of compensable injury. Given the historical interrelationship of many of the rights incorporated by the first ten amendments\textsuperscript{77} and the jurisprudential and precedential themes supporting the judiciary's power to utilize traditionally available remedial powers in their protection,\textsuperscript{78} the inference of compensability is not surprising.

The final step of the \textit{Halperin} analysis, which was to be taken by the district court on remand, requires the determination of the amount of the damage award. While the circuit court's own guidance on the issue was general,\textsuperscript{79} it did note that "Congress in Title

\textsuperscript{71} 606 F.2d at 1207.

\textsuperscript{72} \textit{Id.} (quoting \textit{Paton v. LaPrade}, 524 F.2d 862, 871 (3d Cir. 1975)).

\textsuperscript{73} \textit{Id.} at 1208 (emphasis added) (quoting \textit{Seaton v. Sky Realty Co.}, 491 F.2d 634, 637-38 (7th Cir. 1974)).

\textsuperscript{74} \textit{Id.} at 1207 n.100.

\textsuperscript{75} \textit{See id.} at 1207-08 & nn. 97-100. The evolution of preconstitutional and constitutional safeguards is discussed at pp. 952-956 \textit{supra}.

\textsuperscript{76} \textit{See 606 F.2d} at 1207-08 & nn. 97-100.


\textsuperscript{78} These themes are developed at pp. 948-969 \textit{supra}.

\textsuperscript{79} \textit{See 606 F.2d} at 1208.
III identified $100 a day as the proper award for victims of unlawful wiretapping.\textsuperscript{80} Because Title III did not apply to the Halperins' claim,\textsuperscript{81} the congressional estimate could be only advisory.\textsuperscript{82} The reference to a congressional determination, however, does suggest a viable solution to the damage issue.

Judicial authority to utilize a traditionally available remedy does not co-opt legislative power to define the contours of that remedy, absent frustration of a constitutionally compelled result.\textsuperscript{83} Because legislative decisionmaking has the advantages of a deliberative process, Congress is in a better position than is the judiciary to consider the monetary ramifications of a violation of constitutional rights.\textsuperscript{84} One federal statute, the wiretapping provision discussed in \textit{Halperin},\textsuperscript{85} provides a model for future congressional action regarding damages in \textit{Bivens} suits. Section 802 of the Omnibus Crime Control and Safe Streets Act of 1968\textsuperscript{86} authorizes the award of liquidated damages to "[a]ny person whose wire or oral communication is intercepted, disclosed, or used in violation"\textsuperscript{87} of standards set forth in the Act. Subsection (a) provides for

\begin{itemize}
\item \textsuperscript{80} \textit{Id.} at 1208 n.106.
\item \textsuperscript{81} \textit{Id.} at 1202 n.65.
\item \textsuperscript{82} \textit{Id.} at 1208 n.106: "Although not directly controlling for Fourth Amendment violations . . . [o]ne would expect substantial correspondence between that legislatively established figure for compensation and the amount appropriate for Fourth Amendment violations involving similar harms flowing from similar actions."
\item \textsuperscript{83} \textit{Cf.} \textit{Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics}, 403 U.S. 388, 406-07 & n.7 (Harlan, J., concurring in the judgment) (setting aside question whether Congress could repudiate \textit{Bivens} remedy within its constitutional power).
\item \textsuperscript{84} \textit{E.g.}, \textit{id.} at 412 (Burger, C.J., dissenting): "Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not."
\item \textsuperscript{85} 606 F.2d at 1208 n.106.
\item \textsuperscript{86} 18 U.S.C. § 2520 (1976):
\begin{itemize}
\item Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
\item (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violations or $1,000, whichever is higher;
\item (b) punitive damages; and
\item (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
\end{itemize}
A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.
\item \textsuperscript{87} \textit{Id.}
"actual damages but not less than liquidated damages computed at the rate of $100 a day for each violation or $1000, whichever is higher."  It has been held that plaintiffs can recover the full liquidated amount even absent a showing of any actual injury.

Because of the restrictions imposed by the common law tort model, courts are poorly equipped to award damages where evidence of actual injury is difficult to show. Yet, as at least four circuits have recognized, the personal and social injury suffered by the victim of unconstitutional conduct may have serious, though difficult-to-prove consequences. The propriety of legislative action setting damage awards for constitutional violations is supported by the reemergence of conceptualism as the prevailing foundation for modern tort law. The rejection of "an atomizing of the subject of Torts," which could carry with it modification of the actual-injury doctrine, presupposes that there is "nothing wrong with legisla-

88. Id. §(a).
91. Halperin v. Kissinger, 606 F.2d 1192, 1207 (D.C. Cir. 1979); Paton v. LaPrade, 524 F.2d 862, 871 (3d Cir. 1975); Seaton v. Sky Realty Co., 491 F.2d 634, 636-38 (7th Cir. 1974); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970).
92. See G.E. White, Tort Law in America 178 (1980).
93. Id. at 211.
94. There are at least two areas in which the common law actual-injury doctrine has been modified without legislative action. The doctrine of defamation per se "is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). Justification for the presumption of injury lies in the belief that "statements that are defamatory per se by their very nature are likely to cause mental and emotional distress, as well as injury to reputation, so there arguably is little reason to require proof of this kind of injury . . . ." Carey v. Piphus, 435 U.S. 247, 262 (1978). The Carey Court considered and rejected the argument that the rationale for presumed injury in defamation per se cases should be extended to constitutional tort cases. Id. at 263-64; see text accompanying notes 52-54 supra.

A second area in which the courts have modified the actual-injury doctrine involves the deprivation of voting rights. In Wayne v. Venable, 260 F. 64 (8th Cir. 1919), the Court of Appeals for the Eighth Circuit stated:

In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right.

Id. at 66 (citing Wiley v. Sinkler, 179 U.S. 58, 65 (1900); Scott v. Donald, 165 U.S. 58, 89 (1897)). The Wayne court allowed an award of $2,000 to each plaintiff. Id. at 65, 70. The presumption of compensable injury in voting-rights cases is founded on
tive invasions of common law areas . . . with sweeping doctrinal change if public sentiment demand[s] it, or with the transformation of Torts into a subject, like administrative law, that use[s] private disputes as a basis for making public rules.”

In the context of comprehensive legislation dealing with damage awards, the various (and not always consonant) considerations of compensation, deterrence, certainty, and procedural validity could be subsumed in solving for the all-encompassing goal of organic stability. Thus the three-centuries-old admonition of Chief Justice Pratt in Wilkes v. Wood can be given full effectuation: “Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.”

“grounds of public policy, the importance of the personal right, and the difficulty of vindicating it in any other way.” Jaffarian v. Murphy, 280 Mass. 402, 407, 183 N.E. 110, 112 (1932). In Carey, the Supreme Court acknowledged the voting-rights exception to the actual-injury doctrine, 435 U.S. at 264-65 n.22, but refused to extend the reasoning to a violation of procedural due process. The Court’s recognition of the voting-rights exception, however, does suggest that violations of substantive rights are distinct, for Carey’s purposes, from violations of procedural rights.

95. G.E. WHITE, supra note 92, at 178.

96. It is well-settled since Carlson v. Green, 446 U.S. 14 (1980), that Bivens plaintiffs may be awarded punitive damages. Id. at 21-22. It is also apparent that punitive damages may be awarded even absent a showing of actual injury. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 233 (1970) (Brenman, J., concurring in part and dissenting in part) (citing Basista v. Weir, 340 F.2d 74, 87-88 (3d Cir. 1965); Tracy v. Robbins, 40 F.R.D. 108, 113 (D.S.C. 1966)). The Third Circuit, in Basista v. Weir, stated:

There is neither sense nor reason in the proposition that such additional [punitive] damages may be recovered by a plaintiff who is able to show that he has lost $10, and may not be recovered by some other plaintiff who has sustained it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing of defendant.

340 F.2d 74, 88 (3d Cir. 1965). For a general discussion, see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.3 (1973).

97. Chief Justice Burger’s dissenting opinion in Bivens, 403 U.S. at 411-27 (Burger, C.J., dissenting), while largely concerned with the validity of the exclusionary rule, also suggested that the use of traditional litigation was an ineffective method of compensating victims of unconstitutional conduct. He suggested that Congress create a quasi-judicial structure to deal with constitutional tort claims. Id. at 422-24 (Burger, C.J., dissenting).

98. See text accompanying notes 7-20 supra.


100. Id. at 498-99.
VII. CONCLUSION

The idea that a separation of powers is of the first principles of government is commonly traced\(^1\) to Montesquieu's *De l'Esprit des Loix*. While Montesquieu's work was not the first on the subject,\(^2\) the emphasis devoted to the role of the judiciary was unique\(^3\) and later found acceptance among the framers of the American Constitution.\(^4\) Madison predicted that the federal judiciary would play a special role in enforcing the Bill of Rights;\(^5\) even Jefferson, one not likely to express great confidence in a nonmajoritarian body, saw reason to place faith in an independent judiciary.\(^6\)

The judiciary's strength is in its structure: It can fulfill its constitutional role without the burdens of a cumbersome deliberative process or an everpresent popular influence.\(^7\) Its decisions, however, must be tailored to the litigants and the issues before the court. Thus the Supreme Court's most far-reaching decisions are also most often troublesome. Only simple issues can be resolved in one decision.

In exercising their separate powers, the branches of the federal government were never intended to be "kept totally separate and distinct."\(^8\) Where judicial decisions recognize new causes of action, there is a special need for legislation to answer the many procedural and substantive questions that will undoubtedly arise in litigation. The lack of popular support for any particular action prior to the original decision may explain the legislature's initial nonaction in the same area; however, inaction following that decision can result only in inconsistent judicial decisions, wasted resources, and constitutional rights watered down by the rigorous burdens of enforcing them.

Ten years after *Bivens*, the substantive contours of the action,\(^9\)

\(^1\) M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 76 (1967).

\(^2\) Montesquieu's work in this area was influenced by John Locke and other English writers. *Id.*

\(^3\) *Id.*

\(^4\) E.g., THE FEDERALIST No. 47 (J. Madison).

\(^5\) 1 ANNALS OF CONG. 457 (Gales & Seaton eds. 1789) (remarks of James Madison).


\(^7\) *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS *passim* (1980).

\(^8\) THE FEDERALIST No. 47, at 331 (J. Madison) (J. Cooke ed. 1961).

\(^9\) *See* pp. 970-1018 *supra.*
the procedure governing its institution, the immunities available to defendants, and the measure of damages awarded plaintiffs all remain unsettled. History teaches that the judiciary shoulders the unique responsibility of protecting constitutional rights; at the same time, the limits of the judicial power strongly suggest that the legislature should provide a clear and complete program to effectuate the judicial decision. The many and varied questions remaining to be faced by courts hearing Bivens claims should be addressed by Congress and should be resolved consistent with the purpose of the action itself: the provision of meaningful redress to those whose constitutional rights are violated by government officials.

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Patrick A. Reilly

10. See pp. 1018-1056 supra.
12. See pp. 1094-1107 supra.
13. See pp. 948-969 supra.